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IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,

Petitioners,

against

PHONETELE, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioners[1] pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, which reversed a judgment of the United States District Court for the Central District of California dismissing this private treble damage antitrust action. The District Court had found that because petitioners' tariffs and related conduct at issue here are regulated by the Federal Communications Commission ("FCC") under a public interest standard that is inconsistent with the pure competition standard of the antitrust laws, that conduct has been impliedly immunized from antitrust

1. Pursuant to Rule 28.1 of the Rules of this Court, petitioners set forth below the names of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the petitioners:

Cincinnati Bell Inc.
Cuban American Telephone and Telegraph Company
Gold Star Semiconductor Limited
The Southern New England Telephone Company.

attack. The Court of Appeals reversed, holding that implied antitrust immunity is unavailable to petitioners in this case because the subject tariffs were initiated by petitioners, rather than by the FCC, and were subsequently disapproved by that agency (even though such disapproval was prospective only, and followed the institution of an FCC-administered alternative program to petitioners' tariffs). The Court of Appeals also concluded that antitrust immunity does not attach in this case because the conduct at issue here was not mandated by the pervasive scheme of common carrier regulation to which petitioners are subject.

Question Presented

Whether the district court may assert jurisdiction over an antitrust complaint charging restraint of trade in, and monopolization of, telecommunications services and equipment that petitioners provide through affiliated operating telephone companies solely as pervasively regulated common carriers under Title II of the Communications Act of 1934, which prescribes a public interest standard governing the challenged conduct inconsistent with that of the antitrust laws.

TABLE OF CONTENTS

	PAGE
Question Presented	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
STATEMENT OF THE CASE	1
Proceedings Below	1
The Regulatory Context of the Case	5
A. The Establishment of Common Carrier Responsibility and the Regulation of Interconnection	5
B. The Introduction of Terminal Equipment Competition	9
ARGUMENT	14
The Decision Below Misconstrues And Conflicts With Controlling Decisions By This Court On Implied Antitrust Immunity	14
A. Immunity Must Be Found Because of the Inconsistency Between the Antitrust and Regulatory Standards	14
B. Immunity Must Be Found Because of Pervasive Regulation	20
CONCLUSION	25

TABLE OF AUTHORITIES

PAGE

Cases:

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 50 U.S.L.W. 4512 (U.S. May 18, 1982) 10

American Tel. & Tel. Co. v. FCC, 487 F.2d 865 (2d Cir. 1973) 19

California v. FPC, 369 U.S. 482 (1962) 21

Carter v. American Tel. & Tel. Co., 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) 8, 22

FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) 7, 16, 18

Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975) 5, 14, 15, 17 18, 19, 23

Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974) 16

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 20, 21, 23

Interconnect Planning Corp. v. American Tel. & Tel. Co., 465 F. Supp. 811 (S.D.N.Y. 1978) 19

Jarvis, Inc. v. American Tel. & Tel. Co., 481 F. Supp. 120 (D.D.C. 1978) 19

Litton Systems, Inc. v. American Tel. & Tel. Co., 487 F.Supp. 942 (S.D.N.Y. 1980) 19

New England Tel. & Tel. Co. v. Department of Pub. Util., 262 Mass. 137, 159 N.E. 743 (1928) 7

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 21

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 20, 21, 23

Phonetele, Inc. v. American Tel. & Tel. Co., 435 F. Supp. 207 (C.D.Cal. 1977), *rev'd*, 664 F.2d 716 (9th Cir. 1981) *modified* March 15, 1982 (9th Cir.) 1, 3, 4

Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981) *modified* March 15, 1982 (9th Cir.) 1, 4, 5, 16, 17 18, 21, 22, 23

PAGE

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) 10

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 21

Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir. 1980) 19

Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936) 20, 23

United States v. American Tel. & Tel. Co., 461 F. Supp. 1314 (D.D.C. 1978) 19

United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975) 5, 14, 15, 17, 18 19, 20, 21, 22, 23

United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 21

United States v. Radio Corp. of America, 358 U.S. 334, (1959) 21

Regulatory Proceedings:

AT&T "Foreign Attachment" Tariff Revisions, 15 F.C.C. 2d 605 (1968), *reconsideration denied*, 18 F.C.C. 2d 871 (1969) 9, 10, 11

Carterfone, 13 F.C.C. 2d 420, *reconsideration denied*, 14 F.C.C. 2d 571 (1969) 9, 12

City of Los Angeles v. Southern Cal. Tel. & Tel. Co., 2 P.U.R. (N.S.) 247 (Cal. R.R. Comm'n 1933) 7

Hotel Sherman Co. v. Chicago Tel. & Tel. Co., P.U.R. 1915F 776 (Ill. Pub. Util. Comm'n 1915) 7

Hush-A-Phone Corp., 20 F.C.C. 319 (1955), *rev'd on other grounds*, 238 F.2d 266 (D.C. Cir. 1956) 9

In Re Bluffs & Winchester Tel. Co., P.U.R. 1915A 928 (Ill. Pub. Util. Comm'n 1915) 7

Interstate and Foreign MTS and WATS

35 F.C.C. 2d 539 (1972) 11

40 F.C.C. 2d 315 (1973) 11, 12

56 F.C.C. 2d 593 (1975), 58 F.C.C. 2d 716 (1976), 58 F.C.C. 2d 736 (1976) *aff'd sub nom. North Carolina Utils. Comm'n v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) 12, 13

59 F.C.C. 2d 83 (1976), 64 F.C.C.2d 1058 (1977), 67 F.C.C. 2d 1255 (1978) 12

Littlepage v. Mosier Valley Tel. Co., P.U.R. 1918E 425 (Or. Pub. Serv. Comm'n 1918) 7

Re Curtis Tel. Co., P.U.R. 1917A 674 (Neb. R.R. Comm'n 1916) 7

PAGE

Re Franksville Tel. Co., P.U.R. 1917A 270 (Wis. R.R. Comm'n 1916) 7

Re Springs Mut. Tel. Co., P.U.R. 1918A 488 (S.D. Bd. R.R. Comm'rs 1917) 7

Telerent Leasing Corp., 45 F.C.C. 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) 13

Western States Tel. Co. v. American Tel. & Tel. Co., 19 F.C.C. 2d 1068 (1969) 10

Federal Statutes:

Clayton Act, 15 U.S.C. § 12 *et seq.* (1976) 1
§ 14 1
§§ 15, 25, 26 2

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976) 1,2,8
§ 151 8
§ 153(a), (b) 8, 22
§ 201 ..... 6, 15, 22
§ 202 6
§ 203 6
§ 205 6
§ 213 6
§ 214 ..... 6, 15, 22
§ 214(a) 6
§ 214(d) 6, 8
§ 215 6
§ 410(c) 11
Interstate Commerce Act, 49 U.S.C. § 1 *et* seq. (1976) 7
Maloney Act, 15 U.S.C. § 78o-3 (1976) 22
Mann-Elkins Act of 1910, 36 Stat. 539 (1910) 7
Sherman Act, 15 U.S.C. § 1 *et seq.* (1976) 1
§§ 1, 2 1
§ 4 2
Transportation Act of 1920, 41 Stat. 456 7
28 U.S.C. § 1254(1) (1976) 1

Federal Regulations:

47 C.F.R. pt. 68 (1981) 12

State Statutes:

Cal. Pub. Util. Code § 451 (West 1975) 5, 6
Cal. Pub. Util. Code §§ 701, 728-729, 761-762, 766-769 (West 1975) 6

	PAGE
Conn. Pub. Acts 1879, ch. 36	6
Md. Ann. Code art. 78 (1980)	6
Md. Ann. Code art. 78, § 28 (1980)	5
Md. Ann. Code art. 78, § 75 (1980)	6
Mo. Rev. Stat. 1879 § 883	6
Neb. Rev. Stat. ch. 75, arts. 1, 6-8 (1976)	6
Neb. Rev. Stat. ch. 75, art. 6, § 609 (1976)	5
Neb. Rev. Stat. ch. 75 art. 6, § 611 (1976)	6
N.Y. Pub. Serv. Law art. 5 (McKinney 1955)	6
N.Y. Pub. Serv. Law § 91 (McKinney 1955)	5, 6
Ohio Rev. Code Ann. tit. 49, chs. 4901, 4903, 4905, 4909, 4931 (Page 1977)	6
Ohio Rev. Code Ann. tit. 49, § 4905.21 (Page 1977)	6
Ohio Rev. Code Ann. tit. 49, § 4905.22 (Page 1977)	6
Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon 1980)	6
Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 35, 38 (Vernon 1980)	6
Tex. Rev. Civ. Stat. Ann. art. 1446c, § 58 (Vernon 1980)	6
Congressional Materials:	
Report of Special Study of Securities Markets of the SEC, H.R. Doc. No. 95, pt. 4, 88th Cong., 1st Sess. (1963)	22
S. Rep. No. 781, 73rd Cong., 2d Sess. (1934)	8
H.R. Rep. No. 1850, 73rd Cong., 2d Sess. (1934)	7
Miscellaneous:	
1 P. Areeda & D. Turner, *Antitrust Law*, ¶ 224(d) (1978)	17
Computer Science and Engineering Board of the National Academy of Science, *Technical Analysis of Common Carrier/User Interconnection* (1970)	11
Memorandum for the Civil Aeronautics Board as *Amicus Curiae*, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973)	23

Opinions Below

The initial opinion of the Court of Appeals, filed December 3, 1981, is officially reported at 664 F.2d 716. The March 15, 1982, opinion of the Court of Appeals, modifying in part its initial decision, is not yet reported. The opinion of the District Court, filed July 26, 1977, is officially reported at 435 F. Supp. 207. Copies of the foregoing opinions appear in Appendices A, B and C hereto.[2]

Jurisdiction

The judgment of the Court of Appeals was entered on December 3, 1981. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order filed March 31, 1982 (Appendix D hereto), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The pertinent portions of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*), the Clayton Act (38 Stat. 730, as amended, 15 U.S.C. § 12 *et seq.*), and the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.*) are set forth in Appendix E hereto.

STATEMENT OF THE CASE

Proceedings Below

This petition arises out of the dismissal of a complaint charging that, by filing, implementing, and enforcing tariffs that set forth terms and conditions for the interconnection of customer-provided telephone equipment, petitioners have violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and section 3 of the Clayton Act (15 U.S.C. § 14).

2. Because the Appendices to this Petition are voluminous, they are being separately presented herewith pursuant to Rule 21.1(k) of this Court.

Petitioners American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc., together with their twenty-three affiliated operating telephone companies, are part of an integrated telecommunications common carrier enterprise known as the Bell System. In cooperation with some 1,400 independent telephone companies, the Bell System owns, operates, and manages the nationwide telecommunications network under a pervasive scheme of regulation established by the Communications Act of 1934 (47 U.S.C. § 151 *et seq.*) and comparable state regulatory statutes in each of the contiguous forty-eight States and the District of Columbia. Bell System companies are required by law to provide terminal equipment to their customers as a part of the telecommunications service they provide under tariffs on file with the appropriate regulatory agencies in the jurisdictions in which they operate. Throughout the period involved in this case, the Bell System's interconnection tariffs also set forth the terms and conditions upon which customer-provided devices could be interconnected to the nationwide telecommunications network.

Respondent Phonetele, Inc., is engaged in the manufacture and sale of a device known as the "Phonemaster," which, when connected to telephone lines, monitors dialing signals and permits or restricts transmission of telephone calls to predetermined calling areas. Phonetele is not licensed to provide, and does not provide, telephone service. Instead, Phonetele sells its Phonemaster device directly to members of the general public, who then connect that device to the nationwide telecommunications network over which telephone service is provided by telecommunications common carriers. In 1974, Phonetele initiated this action in the United States District Court for the Central District of California, purporting to base jurisdiction upon section 4 of the Sherman Act (15 U.S.C. § 4) and sections 4, 15 and 16 of the Clayton Act (15 U.S.C. §§ 15, 25 and 26).

The complaint in this case (Appendix F hereto) constitutes a direct attack upon the filing, implementation, and enforcement of the Bell System's interconnection tariffs. Thus, the complaint

alleges as an antitrust violation that petitioners "caused to be filed" tariffs pertaining to the interconnection of customer-provided equipment (Complaint ¶ 32; A-104), that petitioners "actively enforce" these tariffs (Complaint ¶ 33; A-105), and that the tariffs were "interpreted" by petitioners to apply to respondent's Phonemaster device (Complaint ¶ 34; A-105). The remaining conduct alleged in the complaint also relates to the implementation of these interconnection tariffs. Thus, Phonetele alleges that the protective connecting arrangements required by these interconnection tariffs were "needlessly expensive" in California (Complaint ¶ 35; A-105), were even more costly in New York (Complaint ¶ 39; A-106), and were not always available when requested (Complaint ¶¶ 36-38; A-105-106). Phonetele also alleges that the Bell System's provision of telephone equipment to its customers as a part of the telecommunications service provided in accordance with its tariffs constitutes an unlawful tie-in of telephone equipment with "telephone lines" in violation of the antitrust laws (Complaint ¶¶ 41-42; A-106-107).

In granting petitioners' motion to dismiss the complaint, the District Court held that these claims are not properly cognizable under the antitrust laws because the regulatory program established by Congress in the Communications Act vests "comprehensive jurisdiction" over the terms, implementation, and enforcement of tariffs pertaining to the interconnection of customer-provided equipment in the Federal Communications Commission ("FCC") pursuant to a "public interest standard" and that the public interest standard under which this regulatory jurisdiction is exercised is fundamentally different from, and inconsistent with, "the antitrust goals of encouraging free competition." 435 F. Supp. at 210-211; A-71-73. After carefully analyzing both the FCC's broad regulatory powers and the specific exercise of those powers in connection with the particular interconnection tariffs at issue in this case, the District Court determined that the antitrust laws and the laws governing the regulation of interconnection "are sufficiently mutually repugnant to compel the inference that Congress intended to repeal the

antitrust laws otherwise applicable to the area of interconnection" (435 F. Supp. at 212; A-74) and concluded that immunity from the antitrust laws must obtain to "prevent the application of conflicting statutory standards to the [petitioners] and . . . [to] protect the integrity of the regulatory program that Congress established in the Communications Act" (435 F. Supp. at 214; A-76).

The Court of Appeals, in a 2-1 decision, reversed. The panel majority's opinion at the outset briefly described the regulatory scheme embodied in the Communications Act and went on to review the historical background of petitioners' interconnection tariffs and the FCC's actions and decisions regarding interconnection. 664 F.2d at 721-26; A-4-8.[3] The majority opinion cited as "critical" the fact that the interconnection tariffs and related conduct at issue here were "initiated by [petitioners] and not the FCC." *Id.* at 727 n.32; A-32. The panel majority then ruled that a necessary prerequisite for implied antitrust immunity is the existence of an "inconsistency between the challenged conduct and an express policy of the governing agency," rather than an inconsistency between the legal standard of the antitrust laws and that of the regulatory statute. *Id.* at 732; A-14. The majority went on to conclude that, because the FCC in 1975, seven years after the tariffs were filed, ultimately found petitioners' interconnection tariffs to be unreasonable for the future in view of the establishment of an alternative, FCC-prescribed approach to interconnection, "this case involves no conflict between pro-competitive antitrust policies and agency policies." *Id.* at 733; A-16.

The panel majority also declined to find petitioners' interconnection practices impliedly immunized from antitrust liability by the pervasive scheme of common carrier regulation embodied in the Communications Act. *Id.* at 728-30; A-11-13. The panel majority concluded that, in contrast to cases in which such pervasive regulation has been found to give rise to implied antitrust

3. Additional facts pertinent to the regulation of petitioners' interconnection practices and agency action thereon are described at pages 9-13, *infra*.

immunity (*e. g., United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975)), the legislative history of the Communications Act showed no congressional awareness of the practices at issue here (*id.* at 729; A-12); that there was no "specific statutory authorization" for petitioner's interconnection tariffs, and that the "crucial factor" of sanction of those practices by the FCC was absent (*id.* at 730; A-13); and that the FCC's regulatory responsibility under the Communications Act "differs decisively" from that of the agencies in cases in which implied immunity has been found (*id.*).

The Regulatory Context of the Case

As petitioners demonstrate below, the only facts relevant to determining implied immunity under the governing legal standard are those pertaining to the nature and scope of regulatory authority. For that reason, it is necessary to address the regulatory context within which the conduct at issue in this case arose. Regulatory statutes, rules, orders, and other matters of record in administrative proceedings are subject to judicial notice by this Court. *See Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975) ("We have before us the detailed experience of the [agency] regulatory activities, and we have the debates in the Congress. . . . This information is sufficient to permit an informed decision as to the existence of an implied repeal.")

A. The Establishment of Common Carrier Responsibility and the Regulation of Interconnection

The state regulatory statutes that were enacted in the late nineteenth and early twentieth centuries dealing with the provision of telecommunications services provided that telephone companies should be treated as common carriers, thereby imposing a whole range of service responsibilities. A common carrier has an obligation to provide reasonably adequate service at reasonable rates within its geographic areas[4] and it must continue to provide

4. *See, e.g.*, Cal. Pub. Util. Code § 451 (West 1975); Md. Ann. Code art. 78, § 28 (1980); N.Y. Pub. Serv. Law § 91 (McKinney 1955); Neb. Rev. Stat. ch. 75, art. 6, § 609 (1976); Ohio Rev. Code

such service unless and until it receives authority to abandon service from the responsible regulatory agency.[5] These common carrier obligations are monitored and enforced by regulatory controls over every aspect of the telecommunications business, including controls over the rates and profits of the carriers, over the kinds, quality, and availability of the service offered by the carriers, over the relationships between carriers, and over entry into and exit from any segment of the industry.[6]

By 1910, nearly every State in the country had enacted legislation of this kind to govern the provision of telecommunications services,[7] and the common carrier responsibilities imposed by these statutes upon the telephone companies—particularly statutes relating to the obligation of the companies to provide end-to-end service—were vigorously enforced. For example, when some independent telephone companies permitted users to provide their own equipment, state regulatory agencies ordered the telephone companies involved to purchase that equipment from their customers so as to make clear the companies' obligation to protect the integrity of the network by timely and proper maintenance and replacement of all equipment connected to the

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Ann. tit. 49, § 4905.22 (Page 1977); Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 35, 38 (Vernon 1980). Common carriers have the same obligation in furnishing interstate telecommunications service. *See* 47 U.S.C. §§ 201, 214(d).

5. *See, e.g.*, Cal. Pub. Util. Code § 451 (West 1975); Md. Ann. Code art. 78, § 75 (1980); N.Y. Pub. Serv. Law § 91 (McKinney 1955); Neb. Rev. Stat. ch. 75, art. 6, § 611 (1976); Ohio Rev. Code Ann. tit. 49, § 4905.21 (Page 1977); Tex. Rev. Civ. Stat. Ann. art. 1446c, § 58 (Vernon 1980). *Cf.* 47 U.S.C. § 214(a) (imposing requirement with respect to interstate telecommunications service).

6. *See, e.g.*, Cal. Pub. Util. Code §§ 701, 728-729, 761-762, 766-769 (West 1975); Md. Ann. Code art. 78 (1980); N.Y. Pub. Serv. Law art. 5 (McKinney 1955); Neb. Rev. Stat. ch. 75, arts. 1, 6-8 (1976); Ohio Rev. Code Ann. tit. 49, chs. 4901, 4903, 4905, 4909, 4931 (Page 1977); Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon 1980); *cf.* 47 U.S.C. §§ 201-203, 205, 213-215.

7. In 1879, Connecticut and Missouri became the first States to regulate telephone companies as public utilities (Conn. Pub. Acts 1879, ch. 36; Mo. Rev. Stat. 1879 § 883). Today every State comprehensively regulates telecommunications service in accordance with common carrier principles.

network.[8] These state regulatory agencies also consistently rejected requests by customers for permission to interconnect their own equipment to the lines of the telephone company.[9]

The first statute establishing federal regulation of telecommunications, the Mann-Elkins Act of 1910 (36 Stat. 539), subjected telecommunications common carriers to regulation by the Interstate Commerce Commission under the Interstate Commerce Act (49 U.S.C. § 1 *et seq.* (1976)) on substantially the same basis as railroads. When the Interstate Commerce Act was amended by the Transportation Act of 1920 (41 Stat. 456) to reflect an important shift in federal regulatory policy "from one of prohibiting restraints on competition to one of providing relief from the rigors of competition," that shift in policy was, therefore, fully as applicable to telecommunications common carriers as it was to railroads. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 92 (1953). Subsequently, in order to close the "many important gaps"[10] that existed in the federal regulation of the telecommunications industry under the Interstate Commerce Act, Congress

8. *See, e.g., In re Bluffs & Winchester Tel. Co.*, P.U.R. 1915A 928 (Ill. Pub. Util. Comm'n 1915); *Re Franksville Tel. Co.*, P.U.R. 1917A 270 (Wis. R.R. Comm'n 1916); *Re Curtis Tel. Co.*, P.U.R. 1917A 674 (Neb. R.R. Comm'n 1916); *Re Springs Mut. Tel. Co.*, P.U.R. 1918A 488 (S.D. Bd. R.R. Comm'rs 1917); *Littlepage v. Mosier Valley Tel. Co.*, P.U.R. 1918E 425 (Or. Pub. Serv. Comm'n 1918).

9. *See, e.g., City of Los Angeles v. Southern Cal. Tel.Co.*, 2 P.U.R. (N.S.) 247, 249, 251-252 (Cal. R.R. Comm'n 1933); *Hotel Sherman Co. v. Chicago Tel. Co.*, P.U.R. 1915F 776, 782-83 (Ill. Pub. Util. Comm'n 1915); *New England Tel. & Tel. Co. v. Department of Pub. Util.*, 262 Mass. 137, 159 N.E. 743 (1928).

10. The legislative history of the Communications Act makes clear the purpose of that Act to establish a comprehensive and pervasive scheme of regulation:

> [T]he [Interstate Commerce] Act never has been perfected to encompass adequate regulation of communications, but has really been an adaption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the terms of the act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of court and commission interpretation of that act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers.

H.R. Rep. No. 1850, 73rd Cong., 2d Sess. at 4 (1934).

enacted the Communications Act of 1934 (47 U.S.C. § 151 *et seq.* (1976)), which removed telecommunications common carriers from the jurisdiction of the Interstate Commerce Commission and subjected them to regulation by a new agency, the Federal Communications Commission, having comprehensive jurisdiction over the industry[11] and substantial "additional authority".[12] The Communications Act of 1934 expressly preserved state jurisdiction over certain aspects of the telecommunications industry while establishing comprehensive federal jurisdiction over the remaining aspects of the industry, thus creating an "intricate statutory structure in which scarcely a single business act is free from continuous regulation or at least administrative governmental review."[13]

The plan of regulation embodied in the Communications Act was identical to that already in effect in most of the states: telecommunications common carriers were required to offer to the public "all instrumentalities, facilities, apparatus, and services" necessary to provide telecommunications service (47 U.S.C. § 153(a), (b) (1976)); and the FCC was given broad powers to assure the availability and quality of the equipment needed to make available that service, including the power to "require by order any carrier . . . to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier . . ." (*id.* § 214(d)). Where state and federal regulatory statutes imposed common obligations, the telephone companies generally filed the same tariffs with the FCC as were filed with the state regulatory agencies. Hence, the tariffs accepted by the FCC following the enactment of the Communications Act contained provisions generally prohibiting the interconnection of customer-provided equipment in terms essentially identical to those embodied in state tariffs.

11. *See* S. Rep. No. 781, 73rd Cong., 2d Sess. at 3 (1934).
12. 47 U.S.C. § 151 (1976).
13. *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 495 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

B. The Introduction of Terminal Equipment Competition

In *Carterfone*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), the FCC embarked upon a new regulatory policy with respect to the interconnection of customer-provided equipment to the telephone network. In that decision, which dealt only with an acoustically-connected device that did not duplicate or replace any equipment provided by the telephone companies, the FCC invalidated those provisions in the telephone companies' tariffs that had traditionally prohibited the attachment of customer-provided equipment to the network and ordered that the interconnection of such equipment should henceforth be allowed "so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others." 13 F.C.C.2d at 424.

In announcing this new policy, the Commission specifically pointed out that the carriers "were in no wise precluded from adopting reasonable standards to prevent harmful interconnection." 14 F.C.C.2d at 572. Its decision left "to the initiative of the telephone companies" the problem of reconciling the conflict between the new policy of allowing the attachment of customer-provided equipment to the telephone network and the concern for network safety and efficiency. *Id.*[14] Moreover, this conflict had to be resolved by the carriers at a time when even the Commission was openly acknowledging that it was then "in no position to determine the extent to which" interconnection of customer-provided equipment could properly be permitted "consistent with efficient and economic telephone service. . . ." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968),

14. Consistent with the long line of state regulatory decisions discussed at p. 7, nn. 8-9 above, recognizing the complete, end-to-end-service responsibility of telephone common carriers, the FCC had earlier determined that telephone companies have a "right and responsibility" under the Communications Act "to prevent the harmful effects of improper devices or customer practices from being introduced into the system." *Hush-A-Phone Corp.*, 20 F.C.C. 391, 424-25 (1955), *rev'd on other grounds*, 238 F.2d 266 (D.C. Cir. 1956).

reconsideration denied, 18 F.C.C. 2d 871, 873 (1969); *Western States Tel. Co.* v. *American Tel. & Tel. Co.*, 19 F.C.C.2d 1068, 1072 (1969).

The Bell System responded to the Commission's new policy by filing the so-called post-*Carterfone* tariffs which Phonetele seeks to attack under the antitrust laws in this case. These tariffs went beyond *Carterfone* by permitting the direct electrical connection to the telephone network, through a network control signaling unit and protective connecting arrangement provided, installed and maintained by an operating telephone company, of any customer-provided equipment which met certain minimal technical standards set forth in the tariffs. The Bell System could not file tariffs requiring the FCC to adopt and administer a program imposing standards on interconnected equipment (also referred to as a certification program). The only certification alternative available in 1968 would have been for the Bell System to devise, impose and enforce standards on its own, a course which would have placed it in the untenable position of setting standards for the business activities of its competitors, thereby exposing it to potential antitrust liability. *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *see also American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 50 U.S.L.W. 4512 (U.S. May 18, 1982).

Immediately after their filing in 1968, the FCC undertook an intensive investigation of the new tariffs—an investigation in which virtually everyone interested in the interconnection question (including Phonetele) participated. The Commission concluded that the new tariffs should be permitted to go into effect, and in so doing the FCC specifically pointed out that the tariffs were "not in conflict with [the] *Carterfone* ruling." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871, 872 (1969). However, the FCC declined formally to approve the tariffs and maintained its option to decide thereafter that a regulatory

approach different from that reflected in the post-*Carterfone* tariffs might ultimately be found to serve the public interest better for the future. 15 F.C.C.2d at 610-11.

The FCC's acceptance of the post-*Carterfone* tariffs was only the beginning of an intensive period of regulatory activity concerning the interconnection of terminal equipment to the telephone network. Contemporaneously with its acceptance of the post-*Carterfone* tariff revisions, the FCC commissioned a study by the National Academy of Science of the "complex scientific and technical issues" raised by its new interconnection policy. *AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d 871, 875 (1969).[15] The Commission later initiated an informal investigation of interconnection by the Chief of its Common Carrier Bureau, in an effort to determine the feasibility of other approaches to the interconnection of customer-provided equipment "without impairing the functioning of the basic nationwide telephone network" and without causing "adverse effects upon . . . services provided to the public generally." *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 540 (1972). The FCC also instituted Docket 19528, a Federal-State Joint Board investigation of interconnection, in cooperation with the state regulatory agencies under section 410(c) of the Communications Act (47 U.S.C. § 410(c) (1976)), in order to decide whether "to go beyond what we ordered in *Carterfone* . . . and, if so, what terms and conditions should apply to protect the telephone system and services of others." 35 F.C.C.2d at 542.[16]

15. The Academy subsequently concluded that "uncontrolled interconnection to the common carrier network as it now exists would be harmful," and that the PCA, or a certification program properly authorized and enforced by a governmental agency, were reasonable methods of protecting the network from harm. Computer Science and Engineering Board of the National Academy of Science, *Technical Analysis of Common Carrier/User Interconnection*, at ii (1970).

16. The FCC thereafter continued to express its uncertainty as to whether alternatives to petitioners' post-*Carterfone* tariffs were in the public interest. In its First Supplemental Notice in Docket 19528, released in April, 1973, the FCC acknowledged that the threshhold question involved in the proceeding was

> whether the telephone companies . . . should be required or *permitted* to make further significant revisions in their . . . tariffs

In 1975, seven years after *Carterfone*, the FCC established a registration program under which most types of terminal equipment may be submitted to the FCC for registration under a detailed set of technical criteria prescribed by the Commission to protect against network harm.[17] If registered with the FCC, such equipment no longer requires a protective connecting arrangement.[18] However, recognizing the risks of harm to the network from uncontrolled interconnection, the registration orders specifically required the continued use of a protective connecting arrangement for the interconnection of equipment not registered with the FCC. *Interstate and Foreign MTS and WATS*, 56 F.C.C. 2d 593, 599 (1975), 58 F.C.C. 2d 736, 747 (1976), 67 F.C.C. 2d 1255, 1272 n.21 (1978). In view of its prescription of a registration program as an alternative "effective means for preventing such harms," the FCC found the post-*Carterfone* tariffs, which required the use of PCAs for all interconnections, to be prospectively unreasonable. 56 F.C.C. 2d at 598-99. Finally,

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> so as to give customers options that they do not now have thereunder, namely that of being able generally to provide their own network control signalling units (NCSUs) and any needed connecting arrangements (CAs), or the functional equivalent thereof, in lieu of using telephone company-provided NCSUs and CAs as is now required under the tariffs in all interconnection situations involving direct electrical connections. The second basic issue is to determine what terms and conditions should govern *if we should decide to extend such options to customers.*

Interstate and Foreign MTS and WATS, 40 F.C.C.2d 315 (1973) (emphasis supplied).

17. The regulations for the Commission's registration program, 47 C.F.R. pt. 68, comprise more than a hundred pages of procedures and technical specifications or performance criteria.

18. *See Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593 (1975) (First Report and Order in Docket No. 19528), 58 F.C.C.2d 716 (1976) (Memorandum Opinion and Order in Docket No. 19528), 58 F.C.C.2d 736 (1976) (Second Report and Order in Docket No. 19528), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Interstate and Foreign MTS and WATS*, 59 F.C.C.2d 83 (1976) (Memorandum Opinion and Order in Docket No. 19528), 64 F.C.C.2d 1058 (1977) (Memorandum Opinion and Order in Docket No. 19528), 67 F.C.C.2d 1255 (1978) (Third Report and Order in Docket No. 19528).

the FCC made clear that its activity in the interconnection area by no means ended with the promulgation of the registration program:

> [A]s the registration program established herein is new, we believe it should be subject to continuing review and modification, if necessary, as actual experience under the program warrants.

56 F.C.C.2d at 613.

The FCC's regulatory authority extended to the Bell System's conduct in implementing and enforcing the post-*Carterfone* tariffs. Thus, as the FCC expressly pointed out in *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976):

> We have also been monitoring the manner and effectiveness with which the telephone companies are administering their tariff regulations, *with particular reference to the availability and efficiency of the interface protective arrangements required by such tariffs.* We would expect the State commissions to do likewise in discharging their responsibilities with respect to the maintenance of efficient intrastate service.

45 F.C.C.2d at 222 (emphasis supplied).

In short, the history of interconnection shows a consistent pattern of active and pervasive regulation by the FCC under the public interest standard. As the Commission itself put it in *Telerent*:

> The Commission's powers to regulate interstate and foreign communications services are comprehensive and pervasive and embrace the terms and conditions under which customers shall be reasonably permitted to use their own equipment in connection with such services.

Id. at 217.

ARGUMENT

The Decision Below Misconstrues And Conflicts With Controlling Decisions By This Court On Implied Antitrust Immunity

The court below erroneously reversed the District Court's dismissal of a complaint charging that the filing, implementation and enforcement of tariffs setting forth the terms and conditions for the interconnection to telephone company lines of customer-provided equipment are in violation of the Sherman Act. In ruling that the conduct in question was not impliedly immune from the antitrust laws, the lower court misconstrued this Court's decisions in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), holding that implied antitrust immunity is based upon inconsistent statutory standards or pervasive regulation. Because the conduct at issue is subject to a public interest standard which is inconsistent with the competitive standard of the antitrust laws, and the Federal Communications Commission pervasively regulates such conduct, the court below is in error and should be reversed. This action is only one of a number of pending cases which raise the issue of implied antitrust immunity for the interconnection-related conduct of regulated telecommunications common carriers, and granting review to resolve that important jurisdictional question in this action will promote judicial economy in those other litigations.

A. Immunity Must Be Found Because of the Inconsistency Between the Antitrust and Regulatory Standards

This Court has held that immunity from the antitrust laws will attach where the standard of a federal regulatory system is inconsistent with the competitive standard of the antitrust laws. *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975) ("*NASD*"); *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). As the Court has recognized, finding immunity in such a situation is essential to protect

the regulated company from being obligated simultaneously to pursue the conflicting objectives of the antitrust and regulatory regimes.

The antitrust claim in *Gordon* challenged certain commission rate practices of the New York and American Stock Exchanges. The Court reasoned that whereas "the sole aim" of the antitrust laws is "to protect competition," 422 U.S. at 689, the practices at issue in *Gordon* were subject to regulation under a public interest standard which required the SEC to consider factors in addition to competition in determining where the public interest lies. Accordingly, the Court concluded that applying the antitrust laws to these practices would unfairly and improperly subject the defendants to conflicting standards. *Id.*

NASD reinforced the holding of *Gordon*. The Court concluded that the SEC's authority to review certain secondary market constraints under a standard different from and inconsistent with the free competition standard embodied in the antitrust laws "necessarily" compelled the conclusion that the challenged restraints were impliedly immune from the antitrust laws. 422 U.S. at 721-22. Once again, the Court focused upon the inconsistency between the regulatory and antitrust standards:

> In this instance, maintenance of an antitrust action . . . poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated.

Id. at 735.

The application of the foregoing principle to the instant case compels a finding of immunity because petitioners' interconnection-related conduct is regulated by the FCC under a public interest standard different from and inconsistent with the pure competition standard of the antitrust laws. There can be no dispute that the FCC regulates petitioners' conduct under a public interest standard. *See, e.g.*, 47 U.S.C. §§ 201, 214 (1976). Competition is one relevant factor in appraising how best to serve the public interest, but, as the court below found,

> determinations of whether a company's practices are in the public interest as defined by the [Communications] Act require FCC consideration of factors other than competition. Such factors include network safety and efficiency, the need of the public for reliable service at reasonable rates, the proper allocation of the rate burden, the financial integrity of the carriers, and the future needs of both users and carriers.

664 F.2d at 722; A-4 (footnote omitted).

In *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), this Court held that the FCC had erred in basing a decision entirely on enhancing competition rather than by considering all aspects of the public interest standard of the Communications Act. The Court explained:

> [A]s to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications. . . . In this field, . . . encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest.

Id. at 93; *accord, Hawaiian Tel. Co.* v. *FCC*, 498 F.2d at 771, 777 (D.C. Cir. 1974) (FCC may not "automatically equate the public interest with additional competition"). Thus, petitioners are compelled to consider factors other than competition in filing tariffs and determining how to discharge their obligations under the Communications Act.

The predicament the Bell System faced in formulating its interconnection tariffs confirms the wisdom of this Court's conclusion that regulation under an inconsistent standard confers antitrust immunity. Petitioners were obligated to consider factors such as whether interconnection would jeopardize the technical integrity of the telephone network and thereby imperil their ability to

discharge their common carrier obligation to furnish telephone service without posing dangers to their customers or employees or impairing the quality of service. Thus, petitioners were not able simply to follow the rules that govern unregulated markets; they were required to pursue policies that best served the public interest.

In the instant case, the Court of Appeals acknowledged that the FCC regulates petitioners' conduct under a public interest standard rather than a pure competition standard. 664 F.2d at 722; A-4. It also recognized that *Gordon* and *NASD* held that antitrust immunity must be found for conduct regulated under a standard inconsistent with that of the antitrust laws. *Id.* at 726; A-9. Nevertheless, the court below concluded that immunity cannot obtain in this case because the FCC subsequently disapproved petitioners' post-*Carterfone* tariffs and therefore "this case involves no conflict between pro-competitive antitrust policies and agency policies." 664 F.2d at 733; A-16. This test fundamentally distorts the standard for a finding of implied immunity prescribed by this Court's decisions.

As demonstrated above, both *Gordon* and *NASD* held that implied antitrust immunity attaches by reason of a conflict between the legal standards of the regulatory statute and the antitrust laws, without regard to the particular policies that may be adopted from time to time by the regulatory agency pursuant to its legislative mandate. *See* 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 224(d), at 149-53 (1978). Thus, in *Gordon* this Court held that the defendants' fixed commission rate structure was immune from antitrust attack, notwithstanding that the SEC had specifically stated that it had "not approved" the practice in question and that it had subsequently disapproved the practice as contrary to the public interest. 422 U.S. at 672-75, 677. Similarly, *NASD* held impliedly immune from antitrust attack restrictive practices in the marketing of mutual fund securities which had subsequently been disapproved by the SEC. 422 U.S. at 727-28. Indeed, in *NASD* this Court explicitly stated that its

finding of implied immunity was not affected by the SEC's decision "to introduce a controlled measure of competition into the . . . market." *Id.* at 734. Thus, *Gordon* and *NASD* hold that the repugnancy between the antitrust laws and the regulatory scheme required for a finding of antitrust immunity is inconsistency between the antitrust and regulatory standards prescribed in those statutes.

The court below also concluded that antitrust immunity is unavailable because petitioners' interconnection tariffs were carrier-initiated rather than agency-initiated. *Id.* at 727 n.32, 733; A-15-16, A-32. In holding that carrier-initiated conduct cannot be impliedly immune from the antitrust laws, the Court of Appeals imposed a requirement that has never been adopted by this Court, that is irreconcilable with its implied immunity decisions, and that subverts the fundamental policy objectives that underlie those decisions.

The court below was unable to point to any language in *Gordon* or *NASD* that even hinted that action must be initiated or mandated by the regulatory agency in order to qualify for implied immunity. This failure is not surprising, because the conduct held to be immune in each of those cases was initiated by the regulated entities. In *Gordon*, this Court held that the defendants' fixed commission rate structure was immune from the antitrust laws even though it had been voluntarily established by the stock exchanges and their member firms. 422 U.S. at 663-64, 672-75. Similarly, the restrictive practices in the marketing of mutual fund securities attacked under the antitrust laws in *NASD* were held impliedly immune from such attack even though they had been voluntarily initiated by the NASD and its members. 422 U.S. at 718 n.31, 727-28.

The agency-initiation and agency-approval requirements that the court below has engrafted upon *Gordon* and *NASD* would be unworkable and unfair to regulated common carriers. As this Court recognized in *FCC* v. *RCA Communications, Inc.*, 346 U.S. at 90, and as the court below acknowledged (664 F.2d at 722; A-4), Congress has decided that decisions pertaining to the

telephone network should be based on a public interest standard. Because of the overwhelming number of decisions that must be made in relation to the telephone network and to other public utilities that are governed by a public interest standard, it would not be feasible to have regulatory agencies conceive all policies and propose all programs in the first instance. *See American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 880 (2d Cir. 1973). The regulatory system therefore depends upon carrier initiation of tariffs designed to achieve the public interest, subject, of course, to regulatory scrutiny. If antitrust liability were to turn on whether conduct were initiated by the regulatory agency, or whether the carrier correctly guessed the ultimate agency determination of its proposals, carriers would be deterred from proposing rules that served the public interest but might be inconsistent with unrestricted competition, and would propose only policies which enhanced competition, whether or not they served the public interest standard of the Communications Act.[19] This would clearly not permit the Communications Act to function as envisioned by Congress.

The test articulated in *Gordon* and *NASD* requires that petitioners' interconnection tariffs and interconnection-related conduct be held impliedly immune because they are governed by a public interest standard that is inconsistent with the pure competition standard of the antitrust laws. In concluding that immunity is precluded by carrier initiation of the subject tariffs and by the FCC's ultimate disapproval of those tariffs seven years after they were filed and after an alternative means of interconnection

19. The same fundamental misreading of *Gordon* and *NASD* also permeates the decisions of other lower courts which have held that petitioners' conduct is not impliedly immune from antitrust attack because it was carrier-initiated. *See Sound, Inc. v. American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980). *See also Litton Systems, Inc. v. American Tel. & Tel. Co.*, 487 F. Supp. 942 (S.D.N.Y. 1980); *Interconnect Planning Corp. v. American Tel. & Tel. Co.*, 465 F. Supp. 811 (S.D.N.Y. 1978); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 481 F. Supp. 120 (D.D.C. 1978); *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978).

was in place, the court below imposed requirements not contemplated by, and inconsistent with, this Court's controlling decisions.

B. Immunity Must Be Found Because of Pervasive Regulation

This Court has also ruled in a consistent line of cases that the existence of pervasive federal regulatory authority—especially common carrier regulation—immunizes conduct subject to such regulation from antitrust liability. In *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), this Court held that the Civil Aeronautics Board's regulatory authority over route allocations among airlines precluded the application of the antitrust laws. The Court based its conclusion upon the fact that the matters at issue had been committed by Congress to "pervasive regulation . . . designed to change the prior competitive system." *Id.* at 300-01.[20] Similarly, in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), the Court ruled that the antitrust laws were inapplicable to the defendant's alleged use of its control over the plaintiff to dictate the plaintiff's procurement and financing policies. The Court based its decision squarely upon the fact that the conduct in question "is subject to pervasive control by the CAB." *Id.* at 387. This line of authority was most recently reinforced by this Court in *NASD*. There, the Court held that certain activities that were not explicitly embraced by the regulatory statute involved were nonetheless immune from the antitrust laws because the agency's regulatory authority was "sufficiently pervasive to confer an implied immunity." *Id.* at 730.

Significantly, in virtually every case in which this Court has declined to find implied immunity and has upheld antitrust jurisdiction over a complaint involving conduct by a regulated company, it has based its holding upon the fact that the regulatory

20. *See also Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936) (rates applicable to services ancillary to freight warehousing held not subject to the antitrust laws because they were an integral part of the common carrier function regulated by the ICC).

statute involved did *not* subject the defendants to pervasive common carrier or public utility-type regulation with respect to the particular matters alleged in the complaint. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963); *California v. FPC*, 369 U.S. 482, 485 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 348-50 (1959).[21] Thus, contrary to the view of the court below, *Otter Tail* and kindred cases implicitly hold that common carriers are not subject to the antitrust laws with respect to activities within a pervasive scheme of regulation. Taken together with the explicit holdings of this Court in *Pan American*, *Hughes* and *NASD*, these cases unquestionably establish the broad applicability of this principle to regulated communications carriers such as petitioners.

The court below predicated its contrary holding in this case in part upon the ground that although the statutes involved in the *NASD* line of cases reflect a congressional intention to vest the regulatory agency with authority over the challenged conduct, "[t]here is no corresponding legislative history in the case before

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21. *Otter Tail* involved an antitrust complaint charging monopolization of and attempt to monopolize the retail distribution of electric power by refusals to sell power at wholesale to proposed municipal systems, by refusals to "wheel" power to such systems, and by other conduct allegedly designed to discourage municipalities from taking over the distribution of electric power within their boundaries. 410 U.S. at 368. In holding that the antitrust laws could properly be applied to such activities in the interstate electric power transmission field, this Court specifically pointed out that Congress had considered and rejected the suggestion that the interstate transmission of electric power should be subject to pervasive common carrier regulation. 410 U.S. at 373-74. The plain implication of the majority opinion in *Otter Tail* thus is that the antitrust laws would not have been applicable to the activities involved in that case had Congress chosen to impose pervasive common carrier regulation upon the interstate transmission of electric power. Ironically, *Otter Tail* was relied upon by the Court of Appeals to justify its conclusion that petitioners' conduct here, which is pervasively regulated under such common carrier principles, is not immunized from antitrust attack. *See* 664 F.2d at 729; A-12.

us." 664 F.2d at 729; A-12. The Communications Act, however, confers upon the FCC even broader authority over the conduct at issue here than the securities laws' relatively limited grant of authority to the SEC over the conduct in *NASD*. Under the Communications Act, common carriers are required to offer to the public "all instrumentalities, facilities, apparatus and services" necessary to provide telecommunications service, 47 U.S.C. § 153(a), (b) (1976), and the FCC is directed to supervise that conduct under a public interest standard, *see id.* §§ 201, 214. Pursuant to its broad grant of authority, the FCC has for nearly three decades exhaustively exercised its regulatory powers over interconnection of equipment to the telephone network. *See* pp. 9-13, *supra*. The rationale adopted by the court below would have the ironic and wholly unjustified result of denying implied immunity under circumstances where the grant of regulatory authority under common carrier principles is broadest and most comprehensive.

The court below also grounded its decision upon its conclusion that the scope of the FCC's regulatory authority under the Communications Act "differs decisively" from that exercised by the SEC in *NASD* under the Investment Company and Maloney Acts. 664 F.2d at 730; A-13. The latter statutes, as the court below recognized, establish a pattern of self-regulation for the mutual fund industry, subject only to general oversight by the SEC. *Id.* at 729 n.35; A-33. As the SEC itself has observed with respect to the Maloney Act, such a regulatory scheme is less than comprehensive.[22] By contrast, petitioners as telecommunications common carriers are governed by a regulatory scheme "in which scarcely a single business act is free from continuous regulation or at least administrative governmental review . . ." *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 495 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

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22. "It was thought that this kind of self-regulation was far preferable to *detailed and pervasive regulation* by the Government which might be overly burdensome to business and Government alike." Report of Special Study of Securities Markets of the SEC, H.R. Doc. No. 95, pt. 4, 88th Cong., 1st Sess. (1963) at 606 (emphasis supplied).

Finally, the court below refused to find petitioners' conduct impliedly immune because in *NASD* the regulatory agency had "continued to sanction" the challenged practice, which it asserted was a "crucial factor . . . conspicuously absent from this case." 664 F.2d at 730; A-12-13. Although the Court of Appeals' characterization of the FCC's actions with respect to petitioners' interconnection tariffs in the post-*Carterfone* period is demonstrably incorrect (*see* pp. 9-13, *supra*), even were its perception of that agency's decisions accurate it would afford no basis for denying immunity. This Court's decisions on pervasive regulation impose no requirement that the regulatory agency expressly or impliedly approve of the challenged conduct. Thus, in *NASD* the SEC ultimately disapproved the restrictive practices adopted by the defendants. 422 U.S. at 718 n.31, 727-28. In like manner, in *Pan American* this Court applied the doctrine of implied antitrust immunity, even though the CAB had so strenuously disapproved of the defendant carriers' agreement on division of territories that it actually requested the Department of Justice to bring that antitrust suit for the specific purpose of terminating the agreement. Similarly, in *Hughes* this Court found implied immunity from the antitrust laws even though the CAB, in its *amicus curiae* brief, stated that it had never mandated or sanctioned the conduct at issue there. *See* Memorandum for the Civil Aeronautics Board as *Amicus Curiae* at 10. Finally, in *Terminal Warehouse* the Court reached the same result with respect to contracts that had been specifically found by the ICC to be unlawful under the Interstate Commerce Act.

In sum, the pervasive regulation of petitioners' interconnection-related conduct by the FCC immunizes that conduct from antitrust attack. In declining to find immunity the court below imposed a set of requirements for immunity that conflicts with this Court's decisions.

* * *

As petitioners have demonstrated above, the decision of the court below conflicts both with the Court's decisions in *Gordon* and *NASD* establishing implied antitrust immunity based upon

inconsistent statutory standards and with its line of decisions recognizing such implied immunity for pervasively regulated common carrier activity. While this conflict would, in itself, warrant granting review here (*cf.* S. Ct. R. 17.1(c)), there are further considerations beyond the confines of this case which warrant such review. The decision of the court below raises an important question concerning the relationship between the Sherman Act and the Communications Act and comparable state regulatory statutes which is presently at issue in a number of other private antitrust suits pending in five different circuits, all of which are based upon the post-*Carterfone* tariffs. These cases are, like the present action, complex antitrust cases, including several purported class actions, which will almost certainly require many years and many millions of dollars to prepare, and which will unquestionably consume massive amounts of judicial resources to adjudicate. A resolution by this Court of the jurisdictional question involved here and in all of these pending cases, which has never been directly addressed by this Court as to telecommunications common carriers, would save the courts and the parties from the many lengthy and expensive trials that would be a waste of resources if petitioners' position on this issue is correct.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: June 25, 1982

Respectfully submitted,

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81-2350

No. 81-

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IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,

Petitioners,

against

PHONETELE, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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JUNE 25, 1982

TABLE OF CONTENTS

Appendix A	Opinion of the panel majority and dissenting opinion, *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 664 F.2d 716 (9th Cir. 1981)	A-1
Appendix B	Order in *Phonetele, Inc.* v. *American Tel. & Tel. Co., et al.*, No. 77-3877 (9th Cir., March 15, 1982)	A-68
Appendix C	Memorandum of Decision, *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 435 F.Supp. 207 (C.D. Cal. 1977)	A-69
Appendix D	Order in *Phonetele, Inc.* v. *American Tel. & Tel. Co., et al.*, No. 77-3877 (9th Cir., March 31, 1982)	A-79
Appendix E	Statutory Provisions Involved	A-80
Appendix F	Complaint in *Phonetele, Inc.* v. *American Tel. & Tel. Co., et al.*, Civil Action No. 74-3566 FW (C.D. Cal., filed December 5, 1974)	A-96

Appendix A

A-1

(Filed Dec. 3, 1981)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 77-3877

D.C. No. CV 74-3566-WPG

No. 77-2936

D.C. No. CV 73-2511-LTL

PHONETELE, INC.,

Plaintiff-Appellant,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED

Defendants-Appellees.

DASA CORPORATION, ETC.,

Appellant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

OPINION

William P. Gray, U.S. District Judge, Presiding (No. 77-3877)

Lawrence T. Lydick, U.S. District Judge, Presiding (No. 77-2936)

Argued and submitted before a panel consisting of Hufstedler and Kennedy, Circuit Judges, and Claiborne, District Judge, May 7, 1979

Submission ordered vacated November 20, 1979

Reargued and resubmitted before a panel consisting of Kennedy and Fletcher, Circuit Judges, and Claiborne, District Judge, February 6, 1980

Before: KENNEDY and FLETCHER, Circuit Judges and CLAIBORNE,* District Judge.

KENNEDY, Circuit Judge:

These consolidated appeals present to this circuit the question whether a telephone company may be sued for damages and injunctive relief for attempting to monopolize and restrain trade in the distribution and sale of telephone terminal equipment.[1] The case requires us to reconcile the antitrust laws with the regulatory regime established by the Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976 & Supp. III 1979) [FCA or Act].

Plaintiff Phonetele, Inc., manufactures and sells the "Phonemaster," equipment connected to a telephone to prevent the user from placing calls beyond a predetermined area. Plaintiff DASA Corp. manufactures equipment known as "Divert-A-Call" which is connected to a telephone and effects automatic transfer of an incoming call to another telephone number. Both devices are attached by electric connections.

The complaints in these actions arose from the tariffs filed by the defendants with the Federal Communications Commission [FCC] and the California Public Utilities Commission [CPUC], tariffs which prohibited the direct electrical connection of customer-provided equipment to the telephone without the use of a plate-like connecting device, called a "protective connecting arrangement" or "PCA," supplied by the telephone company. Plaintiffs allege that the filing and implementation of these tariffs violated the antitrust laws.

DASA filed its complaint in 1973, alleging violations of sections 1 and 2 of the Sherman Act by General Telephone of California [General Telephone or General], by Ford Industries as manufacturer of an automatic call diverter, and by others unnamed. Damages and injunctive relief were sought.[2] As for the section 1 violations, the complaint generally alleges that since 1966 the defendants combined to unreasonably restrain trade in

* Honorable Harry E. Claiborne, Chief Judge, United States District Judge for the District of Nevada, sitting by designation.

the call diverter market in those areas of California in which General has a state-granted monopoly in telephone system operation. The alleged goal of the concert and agreement was to suppress competition.[3] DASA's section 2 monopolization claim is that General and its co-conspirators have controlled at least 90 percent of the automatic call diverter market in those areas of California in which General operates and that defendants have monopolized the market and have undertaken to destroy actual and potential competitors.[4]

Phonetele's 1974 complaint charges that American Telephone & Telegraph Company (AT&T), the 23 operating companies in which it has major interests, and AT&T subsidiaries Western Electric and Bell Telephone Laboratories,[5] have combined and agreed to restrain commerce in the marketing, sales, and distribution of the Phonemaster, conspired to monopolize the terminal equipment market, and have effected tying arrangements, all in violation of sections 1 and 2 of the Sherman Act, and section 3 of the Clayton Act. Phonetele claims that AT&T and its operating companies control approximately 80 percent of the nation's telephone lines, and that this gives AT&T complete power over all 1,700 independent telephone companies which must use these interstate lines. Misconduct in the establishment and enforcement of an AT&T tariff requiring a coupling device for equipment like Phonetele's is also charged. Finally, Phonetele alleges AT&T was wrongfully responsible for conforming state tariffs and enforcement efforts. Phonetele alleged damages in excess of $30 million. It sought trebling of those damages and injunctive relief. Phonetele has since stated that it will no longer seek injunctive relief.[6]

The district courts below dismissed the actions on the grounds that the FCC (and state utilities commissions where appropriate) had "exclusive jurisdiction" over the subject of interconnection of terminal equipment with the telephone system and that the FCA conferred an implied antitrust immunity for the activities of the defendants.[7]

The immunity issue in Phonetele's appeal concerns the nature and extent of the FCC's regulation pursuant to the scheme created by the Act; DASA's case involves additional and similar issues concerning the CPUC.

I

Regulatory Scheme

The FCA provides for the regulation of telecommunications common carriers by the FCC and requires carriers to file tariffs with the FCC covering "practices" as well as charges.[8] Before changing any of its practices by filing a new tariff, the carrier must give ninety days notice to the FCC and the public.[9] The requirement that carriers file tariffs is the primary mechanism of regulation. Once a tariff becomes effective, the carrier is required to adhere to its provisions.

Section 201(b) requires that "[a]ll charges, practices, classifications, and regulations" be "just and reasonable." The section further states that "any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." Any unjust or unreasonable discrimination in carrier conduct is unlawful. 47 U.S.C. § 202 (1976). Section 201(b) authorizes the FCC to prescribe "such rules and regulations as may be necessary in the public interest" to implement the Act's mandates.

Free competition is not irrelevant to the objectives of utility regulation, but determinations of whether a company's practices are in the public interest as defined by the Act require FCC consideration of factors other than competition. Such factors include network safety and efficiency, the need of the public for reliable service at reasonable rates, the proper allocation of the rate burden, the financial integrity of the carriers, and the future needs of both users and carriers.[10]

Whenever a new tariff is proposed, the FCC may, upon its own initiative or upon the complaint of an interested party, hold hearings concerning the lawfulness of the practice, and may suspend the tariff.[11] Section 205 authorizes the FCC, after hearings and

upon a finding that a tariff does or will violate the Act, to issue a cease and desist order and to prescribe conduct to satisfy the Act's standards.[12]

The act gives the FCC broad jurisdiction over interstate and foreign telephone communications and the carriers which provide such communications; intrastate communications are excepted.[13] General Telephone provides service to a part of California only and so is not subject to the comprehensive direct supervision of the FCC and does not file general tariffs with it. To the extent the facilities of a connecting carrier such as General are used for interstate or foreign communications, it usually files a state tariff that conforms to the tariff the interstate carrier has filed with the FCC. In the case of telephone service, this mechanism of a "conforming tariff" means that when the facilities of an intrastate telephone company are used for interstate communications, the company is thus indirectly subject to the tariffs filed by AT&T.

Terminal equipment is primarily used for intrastate services and is generally provided by a connecting carrier rather than an interstate carrier. For this reason, state public utility commissions have in the past exercised authority over the connection of such equipment, as CPUC did with General. Now, however the FCC asserts "primary authority" over interconnection of customer-provided equipment, to the exclusion of state regulation.[14] This exercise of jurisdiction was affirmed in *North Carolina Util. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

II

Challenges to AT&T's Exclusion of Foreign Attachments.

Tariffs filed with the FCC immediately following passage of the Communications Act generally prohibited the interconnection of customer-provided equipment.[15] The restrictions were similar to those contained in tariffs required by most state utility commissions before the Act was adopted.[16]

In 1965, AT&T's tariff prohibiting foreign attachments was challenged in an antitrust action. The Court of Appeals held that the antitrust complaint was properly stayed while the case was referred to the FCC to determine the legality of the prohibition under the FCA. *See Carter* v. *American Tel. & Tel. Co.*, 250 F. Supp. 188 (N.D. Tex.), *aff'd*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).[17] In 1966 the FCC began its investigation, and in 1968 the Commission issued its watershed decision in *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968) [*Carterfone*]; this decision was strongly presaged by the foundation laid in *Hush-A-Phone Corp.*, 22 F.C.C. 112 (1957) (on remand).[18] The FCC found the then-applicable tariff unreasonable because it "prohibit[ed] the use of harmless as well as harmful devices." *Carterfone*, 13 F.C.C.2d at 424. The FCC struck down the entire tariff and allowed the carriers to "submit new tariffs which will protect the telephone system against harmful devices, and [which] may specify technical standards if they wish." *Id.* at 426. The Commission offered no specific guidance as to the content of the new tariffs.

AT&T responded in November of 1968 by filing an amended version of Tariff No. 263 [the post-*Carterfone* tariff]. This tariff permitted acoustical or inductive connection of customer-provided terminal equipment. It continued, however, to prohibit the direct electrical connection of network control signalling units.[19] Under the tariff, these devices could only be interconnected indirectly by means of the protective connecting arrangement (PCA). The PCA had to be provided and installed by the telephone company before equipment such as a call diverter could be connected.

Various parties objected to the tariff and requested the FCC to reject or suspend it. The FCC declined to do so but it also declined to affirm its validity. The Commission ruled that the post-*Carterfone* tariff filed by AT&T did not violate the precise holding in *Carterfone*. *American Telephone and Telegraph Co. "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605

(1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969) [*AT&T "Foreign Attachment" Tariff Revisions*].[20] The Commission further indicated that it planned to undertake a broad study of interconnection practices and permitted the tariff to go into effect, while explicitly and significantly withholding its approval of the tariff.[21]

Proceeding informally at first, the FCC embarked on an extensive investigation of the interconnection issue.[22] These proceedings culminated in *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)—First Report and Order*, [*First Report*].[23] The FCC concluded that the conditions on interconnection of customer-provided terminal equipment contained in Tariff No. 263 unnecessarily restricted the customer's right to make reasonable use of telephone services and facilities and that such conditions constituted an unjust and unreasonable discrimination. In the same report, the FCC prescribed a system of registration for customer-provided equipment based on various technical specifications. *See* 47 C.F.R. §§ 68.100-.506 (1980). For equipment which did not meet the specifications, the carriers were permitted to require PCAs.

Developments before the CPUC have loosely paralleled those before the FCC. General Telephone's tariffs filed with the CPUC prior to 1966 prohibited the connection of customer-provided equipment to the telephone system. Before *Carterfone*, the CPUC strongly disapproved General's restrictions on devices like Divert-A-Call.[24] After *Carterfone*, General filed a tariff with the CPUC which mirrored the amended tariff No. 263 filed by AT&T with the FCC. This General tariff was challenged in 1972.[25] Subsequently, on October 24, 1973, the CPUC commenced an investigation into the terms and conditions of interconnection of customer-provided equipment. On April 22, 1975, the PUC issued an interim Decision, which became final in May, 1976, and which, like the FCC First Report, adopted a dual system of direct electrical connection of certified devices and the use of protective connecting arrangements for uncertified devices.

Following is a summary of the regulatory pattern applicable to the interconnection of customer-provided equipment. Prior to 1966, the tariffs filed by General Telephone and AT&T prohibited the connection of any customer-supplied terminal equipment and there was virtually no active regulatory effort by either the CPUC or the FCC. The year 1966 marked the start of agency regulatory activity, and between 1966 and 1975 both the FCC and the CPUC undertook studies of the problem. The *Carterfone* decision in 1968 established that there was no justification for a telephone company to enforce a blanket prohibition on all foreign attachments and it further established that tariffs for such attachments should be designed only to prohibit devices dangerous to the system. After the FCC *Carterfone* decision, the direct electrical connection of terminal equipment was affected by telephone company tariffs which required PCA's, furnished by the company, as a condition to permitting direct electric connection of terminal equipment. In 1975, the FCC proposed a comprehensive new plan based largely on the requirement of registration or certification for terminal equipment. The CPUC proposed a similar plan, which become final the following year.

Phonetele first entered the business of developing and manufacturing telephone restriction equipment in late 1970, about two years after the post-*Carterfone* tariffs were filed. Phonetele's complaint was filed on December 15, 1974, and is based on the defendants' conduct after the FCC's *Carterfone* decision. In addition to alleging that the PCA requirement was anticompetitive, Phonetele's complaint alleged that AT&T misinterpreted its own tariffs, delayed the availability of PCA's for Phonemasters outside of California, and charged three and one half times as much for PCA's outside California as in California, all without justification.[26] DASA's complaint was filed in late 1973 and was based primarily on acts which occurred during the period of active regulatory investigation by the FCC and CPUC but before the registration program was adopted. DASA alleged that the

pattern of conduct described in controlling AT&T tariffs and tariffs filed by General with the CPUC violated sections 1 and 2 of the Sherman Act.[27]

III

Implied Antitrust Immunity

Whether there is an implied immunity under the Communications Act is a question of Congress' intent in passing the Act. *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 691 (9th Cir. 1977), *cert. denied in part*, 434 U.S. 1008, *vacated and remanded on other grounds*, 437 U.S. 322 (1978).[28] The Supreme Court has given repeated emphasis to the proposition that antitrust immunities are to be strictly construed and not lightly inferred. An implied immunity may be found only where there is "a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States* v. *National Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) [*NASD*]; *See also Gordon* v. *New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975). "These widely repeated refrains . . . are of limited value in application,"[29] however. One point must be plain: we must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved. From this two further points follow. First, we do not accept as dispositive any of the elaborate taxonomies that have attempted to wrest an abstract framework out of the case law.[30] Second, the uncritical transfer of abstract characterizations about the implied immunity of one industry to the different circumstances of another industry is not a reliable method of analysis.[31] Vague metaphors such as "aggressive regulation" are likewise inadequate tools of analysis.

Relying heavily on *NASD* and *Gordon*, defendants posit three principal arguments in support of implied immunity. First, defendants claim application of the antitrust laws would subject them to inconsistent and conflicting standards and obligations, thereby demonstrating a clear repugnancy between the antitrust

laws and the FCA. Second, defendants maintain the conduct at issue here is subject to pervasive regulatory authority and thus impliedly immune from the antitrust laws. Third, defendants argue that even if the regulatory scheme is not deemed pervasive, antitrust immunity is required because the conduct is aggressively regulated by an agency under direct statutory authority.

A. *Gordon*

Turning to the third argument first, we cannot accept defendants' overly broad reading of *Gordon*. According to the defendants, *Gordon* requires antitrust immunity where the challenged conduct is aggressively regulated by an agency vested with direct statutory authority to do so, regardless of whether the regulatory scheme, taken in its entirety, is sufficiently "pervasive" as to require immunity, and regardless of whether the agency ultimately approves or disapproves the challenged conduct. On close examination *Gordon* does not support such an extensive immunity doctrine.[32] The necessity of considering implied immunity decisions in the context of the industries they govern is well illustrated by *Gordon* and the other securities cases. The securities laws were conspicuously marked from their outset by a reliance on self-regulation. The need to allow a self-regulating industry the freedom to discharge its statutory duties and the inappropriateness of subjecting to antitrust liability the rulemaking and enforcement functions Congress charged the industry with performing decisively shaped the Court's implied immunity analysis in the securities cases.[33]

Several reasons absent from this case combined to support the Court's decision in *Gordon*. The practice of fixed exchange rates at issue in *Gordon* had been explicitly considered by Congress in passing the Securities Exchange Act of 1934. Furthermore, section 19(b) of the Act, 15 U.S.C. § 78s(b) (1976), expressly gave the SEC authority over exchange practices with respect to "the fixing of reasonable rates of commission," notwithstanding Congress' knowledge that this would otherwise be a classic per se antitrust violation. *See Gordon*, 422 U.S. at 664-67, 685. This

explicit grant of authority to the SEC, together with Congress' particular awareness of the very price-fixing practices challenged in the antitrust suit, was evidence that Congress intended the Commission's authority to displace the antitrust laws. A second difference between these appeals and *Gordon* is that the Court held that the SEC's supervision over the practices of the regulated entities was the legal equivalent of "an affirmative order to the exchanges to follow fixed rates." *Id.* at 689 n.13.

B. *NASD*

We also reject defendants' pervasive regulation argument. According to AT&T and General, *NASD* requires that antitrust immunity be implied where the challenged activity is subject to regulation by an agency under a pervasive or comprehensive regulatory scheme, regardless of whether the agency actually exercised its authority to regulate the conduct in question. In *NASD* the Government sought injunctive relief against agreements to fix prices and restrict sales of mutual funds in secondary market transactions between dealers, between investors and dealers, and between investors. 422 U.S. at 701. The Government's complaint challenged both vertical (counts II-VIII) and horizontal (count I) anticompetitive activity. *Id.* at 701-02. The Court concluded that the vertical restraints were immune from antitrust challenge, but it is critical that the restraints so immunized were explicitly contemplated by statute.[34]

Count I of the Government's complaint alleged a horizontal conspiracy between NASD and its members to prevent the growth of a secondary dealer or brokerage market for mutual fund shares by means of anticompetitive interpretation and extension of NASD rules. *Id.* The vertical agreements could not have been implemented without some form of concert, *i.e.*, rulemaking and rule enforcement. Thus the defendants' horizontal conduct was logically necessary to carry out the legitimate agreements and the sanctioned vertical restraints, if not directly responsive to

a regulatory command. Therefore the Court reasoned the concerted activity acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action.[35]

Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry. Cases prior and subsequent to *NASD* preclude such an expansive immunity doctrine. *See, e.g., Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). *Cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597 (1976) (implied state law exemption). In this respect the area of immunity from antitrust laws is not coterminous with areas of agency jurisdiction or agency expertise. The zones of application of each doctrine in specific cases may be quite different, depending particularly on the specific regulatory history preceding a given lawsuit.

There are several relevant distinctions between *NASD* and these appeals which indicate immunity does not arise in this case. First, as was true in *Gordon*, the *NASD* Court concluded that when Congress passed the controlling securities statutes, it was aware of the challenged anticompetitive practices and intended to permit them unless the SEC determined otherwise. *See* 422 U.S. at 722-28. The Court construed the legislative history to mean that Congress intended to give the SEC the exclusive power to disapprove the challenged practices. There is no corresponding legislative history in the case before us. The FCC is not necessarily equipped to police competition in the furnishing of telephone terminal equipment or to enact rules in this regard, other than as necessary to protect the system from damage. Neither congressional mandates nor expressed agency policy leads to any different conclusion. Second, in both *Gordon* and *NASD* the Court concluded that the SEC had continued to sanction the challenged practice during the period covered by the antitrust complaint.

well as many years previously. That crucial factor is conspicuously absent from this case; in fact the contrary is true.[36] Third, the nature of the SEC's regulatory responsibility under the Maloney Act differs decisively from the FCC's responsibility under the FCA. The SEC is required to disapprove any change or addition to an association rule "unless such change or addition appears to be consistent with the requirements of . . . this section." 15 U.S.C. § 780-3(j) (1970) (now codified in 15 U.S.C. § 78s(b)(2) (1976)). In contrast, the Commission is not required under law to pass any judgment on a proposed tariff, and it does not necessarily approve as agency policy the content of every tariff permitted to go into effect. *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, 374 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971). Fourth, in *NASD* the Court found that the practices challenged in count I were closely related to the activities challenged in counts II-VIII, and the latter were expressly contemplated by the federal statutes. There is no corresponding specific statutory authorization, however, for the allegedly anticompetitive tariffs challenged in this case. *See also MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 462 F. Supp. 1072, 1094-95 n.27 (N.D. Ill. 1978); *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F. Supp. 251, 257-58 (D.Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981). We do not read *NASD* to indicate that the FCA-based immunity is either a logical requirement of that decision or consistent with controlling analytic principles generally.[37]

The most compelling distinction in this case, however, is the *Carterfone* mandate, which may be read not only as precluding a repugnancy argument, but also as precluding an inconsistency argument and affirmatively suggesting that an antitrust remedy is eminently consistent with and complementary to the regulatory scheme.[38] The *Carterfone* decision was itself responsive to a stay in an antitrust case pending in the federal courts, and the FCC's

decision contemplated that the federal court would "pass ultimately upon the antitrust issues after proceedings before the Commission should be concluded." *Carterfone*, 13 F.C.C.2d at 421.

A regulatory mandate sufficient to confer implied antitrust immunity may in some cases exist in the presence of the following three elements: First, explicit congressional approval of the ultimate anticompetitive effect of the challenged conduct; second, explicit authorization by Congress to an agency or private entity to order the challenged anticompetitive conduct; and third, no inconsistency between the challenged conduct and an express policy of the governing agency. Such a mandate is absent here. Instead of the three elements outlined above, there is clear inconsistency between the challenged conduct and the agency's interpretation of regulatory policy. The case before us does not present the elements that would support a finding of implied immunity under this analysis. To the contrary, we find the *Carterfone* mandate permits freedom of choice to customers and allows system access to competitors and foreign equipment, subject only to restrictions necessary to avoid damage to the telephone network to preserve its utility for the customer.

C. *Carterfone*

Defendants' primary contention is that after the *Carterfone* decision the regulatory agencies put the carriers on the horns of a dilemma: defendants were required to expand opportunities for the use of customer-provided equipment with the nationwide telecommunications network, but at the same time were purportedly charged with ensuring that the increased use of customer-provided equipment would not endanger the safety, reliability, and efficiency of the network. These obligations, they claim, are conflicting and inconsistent unless antitrust immunity is implied; otherwise, the unidimensional focus on competition embodied in the antitrust laws would conflict with the broader concerns embraced by the public interest standard. Thus, from the regulated entity's viewpoint, a plain repugnancy allegedly exists

between the antitrust laws and the Communications Act. While we acknowledge that this argument has some force, we cannot agree that a perceived repugnancy is sufficient to imply immunity—there must be an actual repugnancy between the antitrust laws and the regulatory system. Here, no such actual repugnancy is present; indeed we find the antitrust remedy complementary to the regulatory scheme clarified by *Carterfone*.[39]

The concept of plain repugnancy must be examined from both the agency's and the regulated carrier's perspective. The rules for implying antitrust immunity on the basis of regulatory statutes reflect two broad concerns: the agency must have sufficient freedom of action to carry out its regulatory mission, and the regulated entity should not be required to act with reference to inconsistent standards of conduct. *See NASD*, 422 U.S. at 722-25; *Gordon*, 422 U.S. at 689.[40] In short, the primacy of the regulatory regime must not be threatened, either from the agency's or the regulated entity's viewpoint.

According to AT&T, finding no immunity in this case would unfairly subject it to conflicting standards with potential liability for violation of either and would also impair the functioning of the regulatory process.[41] We agree with AT&T that where an actual conflict between the Sherman Act and the FCA exists, courts should not reconcile the two statutes in such a way that the rational choice for AT&T is to ignore the FCA standards and attempt to comply with the antitrust laws. Thus, for example, where conduct is compelled by the regulatory agency, not implying antitrust immunity would be unfair to the regulated entity and would frustrate agency policies.

AT&T argues that the FCC adopted the post-*Carterfone* tariffs when it permitted them to go into effect and that it is entitled to antitrust immunity accordingly.[42] We reject this contention. The FCC does not expressly approve or adopt as agency policy the content of every tariff it permits to become effective. By permitting a tariff to go into effect, the FCC does not assert that it has examined the content of the tariff and found it necessary or appropriate to effectuate the regulatory program, nor does it have

an obligation under the Act to make such a finding. *See* 47 U.S.C. § 204 (1976); *MCI Telecommunications Corp.* v. *FCC*, 561 F. 2d 365, 374 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971). In the instant case, for example, the FCC was explicit in not embracing as agency policy the precise content of the post-*Carterfone* tariffs. It permitted the tariffs to go into effect while the agency conducted its own examination of the interconnection issue, but emphasized that "in doing so we are not giving any specific approval to the revised tariffs." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d at 610. More particularly, we do not believe the FCC approved the tariff with respect to antitrust considerations or with the kind of endorsement necessary for antitrust immunity.[43]

From the FCC's perspective, applying the antitrust laws in this case involves no conflict between pro-competitive antitrust policies and agency policies. The FCC did not adopt the post-*Carterfone* tariffs as interim agency policy, and it eventually determined that the requirement of a PCA for all interconnections of customer-provided equipment was unreasonable under the public interest standard of the FCA.[44] To permit a court additionally to hold the same conduct unlawful under the Sherman Act does not jeopardize any policy adopted by the agency.[45]

The final point of AT&T's and General's plain repugnancy argument is grounded in the remedial structure of the FCA. They contend that the Act provides a complete and self-contained remedial scheme, including availability of damages, for violations of the public interest standard. We note this involves a number of suppositions. First we are asked to find an implied legislative intention to award damages to competitors for competitive injury specifically, and we are asked to make the further inference that the assumed remedy was impliedly intended to displace the antitrust laws. Potential liability for violation of the FCA also is part of AT&T's contention that it is subject to sanctions under conflicting substantive standards.

Although we think the assertion that damages are available to competitors under the FCA is open to question,[46] the existence of the remedy would not dictate immunity from the antitrust laws in any event.[47] First, the mere existence of a damages remedy within the Act does not indicate a congressional intent to displace the antitrust laws. The extent of the remedy differs significantly from the reach of the antitrust laws, so it is more probable Congress meant to supplement rather than displace the antitrust laws.[48]

AT&T's argument that the FCA's possible damages remedy and the antitrust laws subject it to conflicting substantive standards is nothing more than a restatement of its principal contention, already discussed above. To the extent the carrier's conduct violates the FCA, those actions were neither compelled by the FCC nor adopted as agency policy. Such conduct should be and is subject to antitrust scrutiny since it is the product of the regulated entity's independent initiative and judgment.[49] Conduct is exempt from the antitrust laws only when the regulated entity is required to pursue a particular course of action to comply with an identifiable and specific mandate of the regulatory statute.

We believe that this discussion of immunity applies with equal force to Phonetele's allegations of harmful ancillary practices by AT&T.[50]

D. *State Regulation*

DASA's complaint is based principally on General's filing of a state tariff conforming to the amended No. 263. Some of the matters pleaded in the complaint, such as the rates charged in connection with the PCA's, appear to be entirely regulated by the CPUC. Prior to 1974, state commissions had broad authority to regulate interconnection practices.[51] General has not specifically argued that the state action exemption applies to the facts of this case, although it has argued that state regulatory activity should be judged under the same standards as FCC regulation, since the state regulation is itself a federal policy of the Communications

Act. Irrespective of the standard we apply, state action exemption or federal immunity, the result is identical: the challenged conduct is subject to antitrust scrutiny. To the extent federal policy embraces state regulatory activity, the foregoing discussion is applicable, *see* TAN *28-50*, pp. 10-20, *supra*, and immunity from the antitrust laws will not be implied. As the following analysis indicates, moreover, the possibility of immunity based on *Parker* v. *Brown*, 317 U.S. 341 (1943), is similarly foreclosed.

The most recent Supreme Court decision analyzing the scope of the state-action exemption is *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). There, in reaffirming its earlier precedents in this area, the Court distilled from those prior decisions two requirements necessary to obtain immunity under *Parker* v. *Brown*: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and (2) that policy must be actively supervised by the state itself. *Id.* at 105. *See also New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).[52] The Court has clearly stated that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Cantor*, 428 U.S. at 592-93 (footnotes omitted).[53]

In light of the foregoing principles, we conclude that the CPUC never embraced the PCA tariff in such a way as to make antitrust immunity appropriate.[54] The CPUC did not strike down the PCA tariff when it was filled by General, but this fact alone is insufficient to confer *Parker* immunity. *See, e.g., Cantor*, 428 U.S. at 592-93; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790-91 (1975).

We do no think the oversight exercised by the CPUC prior to announcement of its registration program constituted clear evidence of an active state policy to displace competition in the area of customer-provided equipment.[55] The CPUC did order General to permit connection of the Divert-A-Call subject to agreement on safety measures, and in late 1973 the CPUC began an

investigation into interconnection practices. As with regulation by the FCC, however, a competitor may sue for damages based on conduct which occurred before the agency adopted any policy on interconnection of foreign attachments, since a decision in such a suit, rendered after disapproval by the agency, could not threaten to disrupt a considered policy of the CPUC.[56]

IV

Antitrust Liability and the Significance of Regulation

Our holding that appellees have no immunity does not mean that we disregard their status as a regulated common carrier. That status is relevant; it is a "fact of market life."[57] While a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be established as a matter of fact in individual cases. When the regulated entity assertedly attempts to respond to its duties as a common carrier by filing and implementing an anticompetitive tariff, the antitrust laws do not apply to the tariff without regard to the technical and legal constraints flowing from the regulatory structure. If a defendant can establish that, at the time the various anticompetitive acts alleged here were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws. At this stage of the proceedings, it appears this inquiry will depend largely on whether the facts show the companies did reasonably conclude, given their expertise, that uncontrolled NCSU interconnection would endanger their own equipment or disrupt their own signal transmissions in identifiable ways, and also that the tariff as filed was the most reasonable, narrowly focused mechanism then available to prevent such real harm from occurring.[58] These matters must be developed at trial.

These factual justifications, the resolution of which is necessarily open at this point, are to be distinguished from the various

legal issues in the case which we now foreclose. The defendants may not justify their actions based on some mistake of law in interpreting the FCA, or judicial or FCC decisions. It will not be open to a defendant to argue that it was entitled as a matter of right to file any tariff it chose or that it was obliged to file a tariff absent the kind of factual necessities we have outlined above.[59] After the *Carterfone* decision, a defendant may not assert that it was entitled by law or agency policy to a monopoly in the furnishing and supply of terminal equipment.

The defense outlined above, the justification of regulatory necessity, must be established in the context of the specific claims made out in the pleadings.

A. *Tying Claims*

Phonetele alleges that AT&T violated section 3 of the Clayton Act, apparently by tying AT&T customers to acceptance of AT&T's interconnecting devices. Tying can constitute a per se violation of both section 3 of the Clayton Act and section 1 of the Sherman Act. *See Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1211-13 (9th Cir. 1977). Conduct that does not meet the requirements of either per se rule, however, may still constitute a violation of the section 1 rule of reason. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 500 (1969). *See United States Steel Corp* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n.1 (1977).

The tying per se rule is exceptional in that it permits the defendant to offer justifications for undertaking the tie. Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1250 (1980). *See, e.g., Moore*, 550 F.2d at 1217. A tie-in may be justified if implemented for a legitimate purpose and if no less restrictive alternative is available. *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *see, e.g., United States* v. *Jerrold Elecs. Corp.*, 187 F. Supp. 545, 557, 560-61 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). The defendant, however, has the burden of showing that the tie-in was

reasonable for the entire time it was in effect. *See Jerrold Elecs. Corp.*, 187 F. Supp. at 558. If a regulated entity in this case can establish a defense consistent with the outline set out above, it will then have a justification which is a defense to the illegal tying charge.[60]

B. *Violations of Section 2 of the Sherman Act*

Both plaintiffs allege that defendants have monopolized in violation of section 2 of the Sherman Act. In general, a section 2 claim requires two principal elements in addition to antitrust injury: (1) possession of monopoly power in the relevent market and (2) willful acquisition or maintenance of that power. *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980, *cert. denied*, 101 S.Ct. 1369 (1981); *California Computer Prods.* v. *International Business Machs. Corp.*, 613 F.2d 727, 735 (9th Cir. 1979). A monopolist may not invidiously use its power in one market, even if lawfully obtained, to harm competition in another market. *See Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Although regulation in certain instances has been considered in determining if monopoly power exists,[61] we need not consider this issue at present. Rather, we are concerned with the conduct element of the monopolization claim.

Willful acquisition or maintenance means that the monopolist must have "engaged in 'willful' acts directed at establishing or retaining its monopoly, 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *California Computer Prods.*, 613 F.2d at 735 (quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966)). The defendants here may protect themselves against a charge of willful monopolistic conduct by the same showing of a reasonable response to factual imperatives affecting a regulated common carrier that are applicable to the tying charge. *See Mid-Texas Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372, 1389-90 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); Watson & Brunner, *Monopolization by Regulated*

"Monopolies": The Search for Substantive Standards, 22 Antitrust Bull. 559, 577-79 (1977). Similarly, in the absence of a direct showing of a specific intent to monopolize in support of any section 2 attempt or conspiracy claims, *see* Watson & Brunner, *supra*, at 583 n.23, the defendants may attempt to rebut an anticompetitive characterization of their conduct, *see generally California Computer Prods.*, 613 F.2d at 737, by the identical showing of reasonable conduct as a regulated carrier, *see id.*; *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 453 n.47 (9th Cir. 1979).

C. *Violations of Section 1 of the Sherman Act*

In response to the allegations of section 1 rule of reason violations in this case, defendants may offer their showing of reasonable conduct to rebut plaintiffs' evidence to the contrary. Should claims of section 1 per se violations other than tying be made, the defendants may respond by offering the same justification applicable to the tying claims.

D. *Conclusion: Regulatory Constraints as a Defense to Antitrust Claims*

As noted in the preceding sections, regulatory and operating constraints imposed on the defendants may be taken into account in ascertaining liability for the section 1, section 2, and tying allegations. That conclusion finds support in both caselaw and commentary. In *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 360-61, 365 (1963), the Court was confronted with a challenge to the New York Stock Exchange's requirement that its members remove private direct telephone wires which had enabled a non-member broker/dealer to communicate directly with the trading desks of member firms. Although the Court refused to find antitrust immunity for exchange self-regulation, *id.* at 360-61, it nonetheless indicated that it was prepared to permit the "interposing of a substantive justification" for challenged conduct which, but for the regulatory setting, would have been deemed per se illegal. *Id.*[42]

Jacobi v. *Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976), also involved rejection of an immunity defense and the creation of a mechanism permitting the antitrust court to evaluate the impact of a regulatory scheme in a per se context. The *Jacobi* court's analysis of the evidence presented at trial indicates its view that a standard of objective reasonableness was appropriate for examination of a stock exchange rule challenged as price-fixing.[63] *See id.* at 1239.

The Fifth Circuit, in *Mid-Texas Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 101 S. Ct. 286 (1980), contemplated a request for implied immunity from a non per se claim. It held, in a case analogous to these consolidated cases, that section 201(a) of the FCA imposed a duty on Southern Bell Telephone Co. (Bell) to resist requests for interconnection of local independent telephone companies when it perceived those requests were not in the public interest.[64] Although unwilling to accord Bell antitrust immunity for its refusal to interconnect an applicant who wished to provide local phone service that Bell also wished to provide, the court granted Bell a new trial, recognizing that "to the extent that [Bell] based its decision . . . on articulable concerns relating to the public interest as defined in [the FCA, it was] entitled to a measure of protection from the effects of the antitrust laws." *Id.* at 1381.

The court ruled that, in resolving the monopolization claim the fact-finder was to consider the extent to which the regulatory scheme affected Bell's actions in refusing interconnection. *Id.* at 1385-90. The court concluded that: "The important issue in this case is whether Bell's action was reasonable under the antitrust law in light of the relevant factors concerning the public interest standard." *Id.* at 1390. Thus, the Fifth Circuit too has adopted a standard of objective reasonableness in assessing a regulated entity's conduct under the antitrust laws. Those principles are applicable here.

Our views are consistent with this and other courts' decisions on the significance of regulation in an antitrust case in other than an immunity context.[65] In *International Tel. & Tel.* v. *General*

Tel. & Elecs. Corp., 518 F.2d 913 (9th Cir. 1975) [*GT&E*], General Telephone & Electronics Corporation defended a charged violation of section 7 of the Clayton Act on the ground that it was part of a regulated, hence noncompetitively oriented industry, and argued that advantages were to be gained by further vertical integration of the telephone industry.[66] While dismissing the argument as irrelevant, this court clarified its position with regard to the effect of regulation:

> This is not to say that the nature and extent of regulation is, in the absence of an exemption, irrelevant from a factual perspective. The impact of regulation on pricing and other competitive factors is too obvious to be ignored. In the absence of an exemption claim, the fact of regulation is significant, but not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law. Rather, the impact of regulation must be assessed simply as another fact of market life.

Id. at 935-36 (footnote omitted).[67]

As the preceding discussion indicates, the proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate. Professors Areeda and Turner state the proposition succinctly:

> [A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.

1 P. Areeda & D. Turner, *supra* note [55], at ¶ 223d. *See* Note, *supra* note [40], 57 Tex. L. Rev., at 825.

We thus recognize that those considerations advanced in favor of implied immunity, while not providing a blanket exemption, do bear on the case in a limited way. The logic of complying with a regulatory mandate is relevant as an antitrust defense, but the

same logic has internal limits which do not justify any and all acts ostensibly taken in response to the FCA. There is no absolute antitrust immunity or exemption by virtue of federal or state law in this case, but the defendants below may offer to show that their actions were justified by the constraints of the regulatory schemes in which they operated.

REVERSED and REMANDED.

FOOTNOTES

1. Many courts have addressed the question; the Second, Third, Fifth, and Eighth Circuits have refused to accord immunity under similar circumstances. *See Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981); *Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980); *Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114 (3d cir. 1979); *Litton Sys., Inc.* v. *American Tel. & Tel. Co.*, 487 F. Supp. 942 (S.D.N.Y. 1980); *Monitor Business Machs., Inc.* v. *American Tel. & Tel. Co.*, 1978-1 Trade Cas. ¶ 62,030 (C.D. Cal. 1978); *Jarvis, Inc.* v. *American Tel. & Tel. Co.*, 481 F. Supp. 120 (D.D.C. 1978); *Interconnect Planning* v. *American Tel. & Tel. Co.*, 465 F. Supp. 811 (S.D.N.Y. 1978); *Macon Prods. Corp.* v. *American Tel. & Tel. Co.*, 359 F. Supp. 973 (C.D. Cal. 1973). In addition, the District Court for the District of Columbia has twice found no blanket immunity in a civil suit by the United States Government that concerned in part terminal equipment. *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978); *United States* v. *American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976). Several courts have addressed the analogous problem in the areas of private longlines communications and interconnection with local telephone companies, generally finding no implied immunity. *See, e.g., Mid-Texas Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 101 S. Ct. 286 (1980); *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 462 F. Supp. 1072 (N.D. Ill. 1978). One court of appeals has addressed the immunity issue in the fairly specialized field of radio/telephone paging systems, and found such immunity on the basis of the state action exemption. *Mobilfone* v. *Commonwealth Tel. Co.*, 571 F.2d 141 (3rd Cir. 1978). The general problem has attracted some attention in the literature. *See* Note, *The Application of Antitrust Law to Telecommunications*, 69 Calif. L. Rev. 497 (1981); Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751 (1979); Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 Yale L.J. 254 (1975).

2. In view of the actions taken by the FCC and the CPUC, DASA's request for equitable relief is moot.

3. Specifically, the complaint alleges, without limitation, the following acts on the part of the defendants:

> 1. The knowing filing of anticompetitive and unlawful tariffs prohibiting any interconnection of non-telephone company equipment;
>
> 2. Replacement of those tariffs, following a determination of their illegality, with new, purposefully anticompetitive tariffs requiring (a) the installation of unnecessary protective couplers actually designed to prevent the Divert-A-Call from working and (b) the payment of unnecessary and unreasonable installation and monthly charges;
>
> 3. Ford's sale of call diverters to General Telephone, accompanied by General's assistance of Ford's efforts to develop a

diverter comparable to DASA's, as well as General Telephone-Ford negotiations towards Ford's future sales to General of its improved call diverters;

4. General Telephone's use of the inconvenience and increased costs imposed on Divert-A-Call users by its tariffs as a point in the promotion of its own call diverters;

5. General's enforcement of its tariffs with threats of termination of Divert-A-Call users' phone service;

6. General Telephone's failure to follow the CPUC's 1972 order to negotiate in good faith with DASA reasonable assurances regarding quality control, installation, and repair that would permit direct connection of Divert-A-Calls;

7. Attempts by General and its co-conspirators to frustrate CPUC and other governmental proceedings dealing with interconnection in order to prolong their unfair competitive advantage.

These acts, DASA contends, harmed competition, telephone users, and itself.

4. In the event that the defendants and co-conspirators did not have monopoly power in the relevant market, DASA claims that (1) there was a dangerous possibility that a monopoly would be established; (2) the defendants and co-conspirators specifically intended to create such a monopoly; (3) the previously detailed acts were in furtherance of an attempt and conspiracy to monopolize; and (4) that attempt should be enjoined and damages should be awarded to DASA. Finally, DASA charges the defendants and co-conspirators with wrongful interference with DASA's contractual relations with its customers.

5. The complaint does not detail misconduct by Western Electric and Bell Telephone Laboratories, the manufacturing and research arms of AT&T. The complaint, in that it alleges an overly protective tariff and delay and error in the design of protective couplers, however, implies misconduct by the AT&T subsidiaries.

6. Phonetele charges that AT&T and the operating companies have misinterpreted the tariffs so as to apply to the Phonemaster while knowing that the Phonemaster is not covered by the tariffs, or, even if the Phonemaster is covered, knowing that the Phonemaster requires nothing more for connection than a simple terminal block. Phonetele, although objecting to the poor quality of the PCA made available in California and to the fees associated with that coupler, also complains of AT&T's delay in making a similar protective coupler available in other parts of the United States. When a similar coupler finally was made available outside of California, Phonetele charges that it was three and one-half times as expensive as the already too expensive California coupling arrangement. Phonetele claims that the imposition of protective coupling arrangements has caused unnecessary design and installation problems and attendant delays and has caused either Phontele or Phontele's customers to bear unnecessary costs.

In sum, Phonetele claims that AT&T and the operating companies have used their monopoly position to ensure that their own customers shall use only telephone company equipment.

7. *See Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977); *DASA Corp.* v. *General Tel. Co.*, 1977-2 Trade. Cas. (CCH) ¶ 61,610 (C.D. Cal. 1977).

8. Section 203(a) of the Act, 47 U.S.C. § 203(a) (1976), requires such carriers to file tariffs with the FCC "showing all charges . . . and showing the classifications, practices, and regulations affecting such charges."

9. 47 U.S.C. § 203(b) (1976).

10. *See Washington Util. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *See generally FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974); *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F. Supp. 251, 253 (D. Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981); Satellite Bus. Sys., 62 F.C.C. 2d 997 (1977).

There is a pro-competitive policy embodied in the FCA, although it is a corollary of the more basic policy of favoring customer utility and freedom of choice. *See* Proposal for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), Second Report and Order, 58 F.C.C. 2d 736, 740 (1976) [*Second Report*].

11. 47 U.S.C. § 204 (1976). The FCC may suspend operation of the new tariff for up to five months. *Id.* § 204 (Supp. IV 1980). If the FCC has not completed its hearings by that date, the new tariff becomes effective subject to subsequent invalidation by the Commission.

12. Failure to obey an FCC order will result in a $1,000 fine for every violation, to be levied each day in the case of continuing offenses. 47 U.S.C. § 205(b) (1976). A carrier found to have violated the Act is liable to any person injured as a result of that violation for the "full amount of damages sustained," plus the attorney's fees of the injured person. 47 U.S.C. § 206 (1976). Section 207 establishes two avenues of recovery. An injured party may sue for damages "in any district court of the United States", or the party may file a complaint with the Commission pursuant to section 208. When a person claiming injury files a complaint with the Commission, the carrier is required to respond in writing. 47 U.S.C. § 208 (1976). If, after receiving the carrier's response, the party chooses to pursue his complaint, the Commission must investigate whether there appear to be any reasonable grounds supporting the complaint. *Id.* If the FCC concludes that the party is entitled to damages, it may order the carrier to pay the complaining party. 47 U.S.C. § 209 (1976).

For other descriptions of the FCA, *see, e.g., Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114, 1117-20 (3rd Cir. 1979); 446 F. Supp. at 1095; *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F.Supp. 251, 253 (D.Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981).

13. The Act explicitly states that nothing contained in the chapter on common carriers "shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b) (1976). That section further provides that, with certain exceptions (47 U.S.C. §§ 201-205 (1976)), the Commission shall not have jurisdiction over any "connecting carrier," *i.e.*, a carrier which provides interstate communication only through physical connection with another carrier not controlling it or controlled by it. *Id.*

14. In the present case, for example, the CPUC regulates General. Yet because terminal equipment generally has the potential to be used in interstate telephone connections, any restriction on its connection contained in the tariffs filed by AT&T would also apply to terminal equipment of intrastate carriers. *See* Telerent Leasing Corp., 45 F.C.C. 2d 204, 216 n.21 (1974). Until recently, however, there appeared to be no reason why a state could not apply more restrictive regulations for the interconnection of customer-provided terminal equipment.

15. In 1956 AT&T's blanket prohibition against connecting any equipment was struck down as a violation of the FCA. *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956), *after remand*, 22 F.C.C. 112 (1957). The "Hush-A-Phone" was a cup-shaped device which attached to the mouthpiece of the handset to provide privacy for the speaker and quiet for others near the phone. There was no electrical connection between the telephone and the Hush-A-Phone. AT&T responded to this decision by filing a tariff which prohibited all "direct electrical connection" and interconnection by any means of customer-provided equipment. *See Carterfone*, 13 F.C.C. 2d at 437-38.

16. Many state public utilities commissions apparently felt that the telephone company must maintain end-to-end responsibility to preserve the integrity and reliability of the telephone network. For example, when some telephone companies permitted users to provide their own equipment, some state regulatory agencies ordered the carriers to purchase that equipment from the customers, thus highlighting the carrier's responsibility for maintaining the system. *See, e.g.* Bluffs & Winchester Tel. Co., P.U.R. 1915A 928 (Ill. Pub. Util. Comm'n 1915); Franksville Tel. Co., P.U.R. 1917A 270 (Wis. R.R. Comm'n 1916); *Littlepage* v. *Mosier Valley Tel. Co.*, P.U.R. 1918E 425 (Ore. Pub. Serv. Comm'n 1918); Swanson, P.U.R. 1920E 633 (Cal. R.R. Comm'n 1920). *See also, Quick Action Collection* v. *New York Tel. Co.*, P.U.R. 1920D 137 (N.J. Bd. Pub. Util. Comm'rs 1920) (rejecting attempt by customer to replace parts of telephone company equipment); *City of Los Angeles* v. *Southern Cal. Tel Co.*, 2 P.U.R. (n.s.) 247, 249-50 n.1 (Cal. R.R. Comm'n 1933) (same) (collecting cases).

17. The plaintiff in that action manufactured a device known as the "Carterfone." The Carterfone connected acoustically and inductively (as opposed to electrically) to the telephone and permitted the caller to connect his telephone to a two-way radio. *Carter*, 365 F.2d at 490.

18. *See* note 38, *infra*.

19. "Network control signals" are electronic impulses which activate connections between telephone centers, control switches, and start and stop the equipment used for billing. Devices that generate or activate network control signals are a category of terminal equipment known as "network control signaling units" (NCSUs). According to the defendants, plaintiffs' devices are network control signaling units and have the potential to disrupt system operations and message accounting if not properly manufactured, installed and maintained. *See also* notes 20 & 38, *infra* (discussing legal significance of NCSU/non-NCSU distinction).

20. We must emphasize that our interpretation of this statement by the Commission supports our holding. The post-*Carterfone* tariff was in "in conflict" with *Carterfone* in the sense that *Carterfone* did not deal specifically with customer replacement of terminal equipment, and the Commission had not been, in 1968, in a position to say whether the suggested possibility of greater danger from NCSUs was so substantial or unpredictable as to permit a blanket prohibition by AT&T. *See* note 21, 38, & 43, *infra* (discussing *Carterfone* and subsequent interpretations of decision).

21. In our opinion, these and other matters warrant further consideration by the Commission before it determines whether and what further action, if any, may be required. We believe that we will be in a better position to make these determinations after we have had a reasonable opportunity to closely observe the effects of the substantial changes now being effectuated by the telephone companies in their interconnection tariffs, the extent to which such changes satisfy reasonable requirements of their subscribers for . . . communication services or facilities, and the implementation by the telephone companies of their representations that they are actively engaged in devising equipment and operating procedures to meet the expressed needs of customers for flexible access to the switched network. Thus, *we will permit the tariff revisions to become effective as scheduled with the understanding that in doing so we are not giving any specific approval to the revised tariffs.*

AT&T "Foreign Attachment" Tariff Revisions, 15 F.C.C.2d at 610 (emphasis added).

The Commission took this stance because it was then "in no position to determine the extent to which" interconnection of customer-provided equipment could properly be permitted "consistent with efficient and economic telephone service." *Id. See also AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d 871, 873 (1969) (denying petitions for reconsideration); Western States Tel. Co., 19 F.C.C.2d 1968, 1072-73 (1969). It did, however, indicate that AT&T could consider the safety of the telephone network in formulating the new tariff. *Carterfone*, 14 F.C.C.2d at 572, 573 (denying petitions for reconsideration).

22. The FCC commissioned a study by the National Academy of Sciences and gathered information from other sources. In June, 1972, the FCC began formal proceedings to determine whether the post-*Carterfone* tariffs should be revised. Many users, equipment suppliers, and carriers participated in the hearings. The agency created a federal-state joint board to investigate interconnection practices. At about the same time, many state utilities commissions undertook independent investigations of the same issues. The potential for conflicting regulatory schemes led the FCC in 1974 to assert "paramount" or "primary" jurisdiction over the terms and conditions governing the interconnection of all equipment used in interstate communications. Telerent Leasing Corp., 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC*, 537, F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). After the *Telerent* decision, state utilities commissions still have authority over the rates and charges for interconnection and carrier-supplied terminal equipment. *See North Carolina Util. Comm'n*, 552 F.2d at 1047-48.

23. 56 F.C.C.2d 593 (1975), *modified in part*, 57 F.C.C.2d 1216, (1976), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC*, 552 F.2d 1036, (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

24. In 1966, the CPUC found a call diverter functionally similar to the Divert-A-Call not to present any significant hazard to the telephone system. The CPUC ordered General to allow interconnection of that device without a connecting arrangement or to purchase and supply the device itself.

25. DASA's predecessor in interest, Com-U-Trol, filed an action before the CPUC in February, 1972, to compel General Telephone to allow interconnection of the Divert-A-Call. Although the CPUC ordered that General "shall permit the direct electrical connection of Divert-A-Calls to the telephone network subject to the condition that complainant shall provide reasonable assurances that quality control, installation, and repair procedures . . . necessary for the preservation of network integrity and safety will be uniformly followed," Interim Decision N. 80972, Com-U-Trol and General were unable to come to agreement on the necessary procedures.

26. *See* TAN 5 & 6, p. 3, and notes 5 & 6., *supra*.

27. *See* TAN 2-4, pp. 2-3, and notes 2-4, *supra*.

28. No section of the FCA expressly confers immunity in the area of interconnection, and defendants do not contend Congress intended any blanket immunity. *See Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324, 1327 (8th Cir. 1980). Rather, the narrower claim is that immunity should be implied in the discrete context of interconnection.

29. *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F. Supp. 251, 256 (D. Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981).

30. *See* Notes, *supra* note 1.

31. For example, the immunity analysis in securities cases, and the deference of the Court to any administrative action or conduct claimed to be "necessary to make the securities laws work," must be understood

with reference to the grave historical crises caused by the absence of regulation in those industries. The Court has been exceptionally reluctant to allow via the antitrust laws any tampering with the regulatory framework that might threaten the recurrence of similar harm to investors. *See NASD*, 422 U.S. at 705-11; *Gordon*, 422 U.S. at 681-82; *Jacobi* v. *Bache & Co.*, 520 F.2d 1231, 1234 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). In contrast, potential harms to the public by accommodating regulation to the policy of the antitrust laws in other industries, such as the telephone interconnection industry, has not been well demonstated. *See* TAN 32-33, pp. 11-12, & note 33, *infra*.

32. The plaintiffs in *Gordon* challenged primarily the practice of the securities exchanges and their members of using fixed rates of commission for certain kinds of sales. 422 U.S. at 661. The Court held that the challenged practices of the exchanges and their members were immune from antitrust attack. *Gordon* does not hold that whenever a federal agency has the authority to approve or prohibit conduct by a regulated entity and is engaged in detailed study of particular conduct, that conduct which occurs during the period of agency study may not be the basis for an antitrust action. Such a situation, without more, does not establish a plain repugnancy between the regulatory scheme and the antitrust laws. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), is precisely contrary and controlling on this issue. *See also* note 31, *supra* (special characteristics of self-regulating securities industry); TAN 32-33, pp. 11-12, & note 33, *infra* (same).

It is critical here that the pre-*Carterfone* version of Tariff 263 was initiated by the carrier and not the FCC. If the original practice being studied by the agency was not undertaken by the regulated entity to comply with a directive of the agency, and there is no evidence that Congress was either aware of the particular anticompetitive practice or gave the agency specific power to authorize it, we fail to see the relevance of agency study to immunity for anticompetitive injury suffered during the period of agency review. *See also* note 38 *infra* (discussing significance of *Carterfone.)*

33. *See Silver* v. *New York Stock Exch.*, 373 U.S. 341, 349-57 (1963); *Gordon*, 422 U.S. at 660-82; *NASD*, 422 U.S. at 720-30. Justice Stewart concisely described this unusual facet of the securities industry:

> The purpose of the self-regulation provisions of the Securities Exchange Act was to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry. This self-initiating process of regulation can work effectively only if the process itself is allowed to operate free from a constant threat of antitrust penalties.

Silver, 373 U.S. at 371 (Stewart, J., dissenting). *See also* Note, *supra* note 1, 69 Calif. L. Rev. at 513-14.

34. The Court held the vertical restraints immune because of section 22(f) of the Investment Company Act, 15 U.S.C. § 80a-22(f)

(1976), which prohibited restrictions on the transfer of mutual fund shares except as specified in the registration statement, but in any event not "in contravention of such rules and regulations as the [SEC] may prescribe" in the public interest. At the time the lawsuit was begun, the SEC had never exercised its authority under this section to promulgate rules governing transfer of mutual funds shares, although during the lawsuit the SEC indicated it planned to exercise its regulatory authority. 422 U.S. at 718-19 n.31. The Court reasoned:

> [T]he agreements challenged in counts II-VIII are among the kinds of restrictions Congress contemplated when it enacted that section. And this conclusion necessarily leads to a determination that they are immune from liability under the Sherman Act, for we see no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws.

427 U.S. at 721-22.

35. The Court noted that the theory of the Government's section 1 charge in count 1 of the complaint was imprecise and obscure. 422 U.S. at 730-31. Originally the complaint seemed to attack the establishment and maintenance of the rules and the rules themselves, *id.* at 730-31 n.42; later the focus shifted to the way the defendants enforced and interpreted the rules. In any event, the practices attacked were a logical corollary to some degree of a system of rules designed to prevent a secondary market, and this ultimate goal the Court found clearly sanctioned by the Congress. There is in the case before us no analogous sanction for clearly anticompetitive behavior or for practices in aid of thereof.

The activities in *NASD* were not required or specifically authorized by any particular securities statute, but rather by an integrated scheme of self regulation overseen by the SEC. The issue presented was thus "whether the SEC's exercise of regulatory authority under [the Investment Company Act] and the Maloney Act is sufficiently pervasive to confer an implied immunity." *Id.* at 730. The Court noted that under the Maloney Act the SEC must disapprove an Association rule or change in a rule unless it is consistent with the regulatory policies of the Act, *id.* at 732, and that the SEC is authorized to require changes in the Association rules. For 35 years the SEC had, in the Court's view, approved the vertical restraints challenged in counts II-VIII. The SEC's authority to regulate the defendants' interpretation and application of these restrictive rules was just as broad as its authority over the initial promulgation of the rules. The Court reasoned: "[W]e can see no meaningful distinction between the Association's rules and the manner in which it construes and implements them. Each is equally a subject of SEC oversight." *Id.* at 733. The Court noted that Association rules were subject to careful scrutiny by the SEC, *id.* at 734, and concluded that antitrust immunity was necessary to make the regulatory scheme function.

36. *See* Hush-A-Phone, 22 F.C.C. 112 (1957) (after remand). *See also* TAN 38, p. 16, & note 38, *infra*.

37. In *Cantor*, decided after *NASD*, the Court reaffirmed that it "has consistently refused to find that regulation gave rise to an implied exemption without first determining that the exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' " *Cantor*, 428 U.S. at 597 (footnote omitted) (quoting *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357 (1963)).

38. *See* note 32 *supra*. As early as 1956, the justification for restricting foreign attachments had been authoritatively construed to be limited to instances of impairment of the telephone system. *See Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 268-69 (D.C. Cir. 1956), *after remand*, 22 F.C.C. 112 (1957). This point was reasserted in 1968 in emphatic terms, in the FCC's *Carterfone* decision which preceded the filing of the tariffs at issue here. The Commission there held that a tariff was intrinsically unreasonable if it restricted interconnection for reasons other than actual impairment of the system or its utility to users. The following language is representative of the Commission's directive that carriers be as narrowly specific in preventing interconnection and as open to customer choice and thereby the competition of foreign attachments as possible:

> [O]ur conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others. A tariff which prevents this is unreasonable; it is also unduly discriminatory when, as here, the telephone company's own interconnecting equipment is approved for use. *The vice of the present tariff, here as in Hush-A-Phone, is that it prohibits the use of harmless as well as harmful devices.*
>
> . . . .
>
> There has been no adequate showing that nonharmful interconnection must be prohibited in order to permit the telephone company to carry out its system responsiblities. . . . *We are not holding that the telephone companies may not prevent the use of devices which actually cause harm, or that they may not set up reasonable standards to be met by interconnection devices.*
>
> . . . The telephone companies would remain free to make improvements to the telephone system and could reflect any such improvements in reasonable revised standards for nontelephone company provided devices used in connection with the system. Manufacturers and sellers of such devices would then have the responsibility of offering for sale or use only such equipment as would be in complaince with such revised standards.
>
> . . . *That the telephone companies may not have known prior to the proceedings herein that the Carterfone was in fact harmless is irrelevant, since they barred its use without regard to its effect upon the telephone system.* Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission. . . .

> [W]here the carrier itself initiates the rate or practice its lawfulness remains open, not only to a prospective finding but also to a retroactive one.

Carterfone, 13 F.C.C.2d at 424-25 (emphasis added).

One further point must be added. We do not accept as significant any argument that the equipment at issue in *Carterfone* was not network control signalling equipment, whereas at least some of the equipment at issue here might be characterized as such. The rule we read in *Carterfone* is that the carriers were put on notice that tariffs might reasonably prohibit only those foreign attachments that posed a significant actual danger to the system. While a tariff might reasonably treat the connection of foreign network signalling equipment differently from the connection of other equipment that was not, this would be simply derivative of the actual danger criterion, in that the former type of equipment alone might pose such a danger. We find no significance to the distinction apart from this criterion, however.

The Commission, as well as this court, has clearly and repeatedly held that while the precise holding of *Carterfone* did not decide the issue of customer replacement of NCSU equipment, the broad and binding principle of *Carterfone*, and *Hush-A-Phone* before it, applied to *all* telephone equipment. As we said in *International Tel. & Tel. Corp.* v. *General Tel. & Elecs. Corp.* 518 F.2d 913, 933 (9th Cir. 1975):

> *Carterfone* declared void those tariffs filed with the FCC and state regulatory commissions by all domestic telephone operating companies prohibiting the interconnection of subscriber-owned equipment with the carrier's telephone system. As a result of the *Carterfone* decision, all telephone subscribers are now free, in theory, to buy their own telephone equipment from suppliers of their choice. But telephone operating companies have succeeded in minimizing the impact of *Carterfone* through tariffs requiring telephone companies to supply and install interface devices.

(Footnote and citation omitted). We are bound by our previous interpretation of *Carterfone*. *See also First Report*, 56 F.C.C.2d at 594-96 ("our *Carterfone* decision was not limited to the Carterfone device *per se*, but was rather a broad general policy. [. . .] [T]his broad *Carterfone* policy applied equally to devices which had direct electrical connections."); American Telephone and Telegraph Co.'s Proposed Tariff Revisions in Tariff No. 263 Exempting Mebane Home Telephone Co., 53 F.C.C.2d 473, 476-78 (1975) [*Mebane Home Telephone Co.*]:

> The foregoing adequately demonstrates the broad principle underlying *Hush-A-Pone* and *Carterfone*, namely, the subscriber's right to make beneficial use of an interconnected device without causing harm to the telephone company's operations. We see no reason why this broad principle should not extend to interconnected devices such as PBX's and key systems which may replace telephone system equipment. [. . .] The determining factor should be whether there is harm to the telephone network, irrespective of whether the particular interconnection device is one of the nature involved in *Carterfone* or a PBX

> system or key system. To make a distinction based solely on whether there is a substitution of telephone company equipment, would be an arbitrary and unreasonable infringement of the subscriber's right in the absence of technical harm or other public detriment.

This point was made recently by an FCC hearing examiner:

> The defendant[s'] attempt to limit the broad general policy expressed in *Hush-a-Phone* and *Carterfone* to exclude devices with direct electrical connections must be rejected. There is simply no justification for such a construction. The important and critical factor is whether the device is harmful or harmless, irrespective of whether a direct electrical connection may be involved. More specifically, there was no justification for tariffs which precluded the connection of devices by direct electrical connections which were harmless to the system.

Western States Tel. Co., FCC Docket 16883, slip op. at 58 (Initial Decision of ALJ, released April 10, 1981).

See also note 20, *supra*.

39. *See* note 38, *supra*.

40. As one student commentator has noted, "One goal implicit in implied immunity analysis is to avoid unfairly subjecting the antitrust defendant to contradictory legal standards, penalizing through the antitrust laws conduct that the regulator in some sense ordered." Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751, 824 (1979).

41. Both the antitrust laws and the FCA permit the FCC and the courts to prescribe conduct, through hearings and injunctive relief, respectively, and both laws provide for damages remedies. If a utility adopts a course of conduct seeking to comply with the standards of the FCA, AT&T argues it is more likely to be held liable for treble damages under the antitrust laws; but if the utility adopts Sherman Act standards as its directive and files tariffs designed to maximize competition, AT&T suggests it may be faulted for not heeding the public interest standards of the FCA. We indicate below, however, that these concerns may be assuaged without our finding implied immunity. *See* TAN 57-67, pp. 22-30, *infra*.

42. The issue of agency approval of the post-*Carterfone* tariffs relates not so much to the policy of deference to a regulatory agency as it does to the fairness to the regulated entity. Since the district court decisions in *DASA* and *Phonetele* occurred after the FCC had declared the post-*Carterfone* tariffs unlawful, subsequently permitting an antitrust action for damages does not conflict with an agency policy. *Cf.* Note, *supra* note 40, 57 Tex. L. Rev. at 819-20 (retroactivity of *First Report* bears on issue of fairness, not on issue of conflict giving rise to immunity).

43. The majority of courts addressing the issue have concluded that the FCC did not approve the post-*Carterfone* tariffs for purposes of determining antitrust immunity. The district court in *Essential* may be interpreted to hold an opposite conclusion. *See* 446 F. Supp. at 1102, *rev'd*, 610 F.2d 1114 (3d Cir. 1979). The court concluded that "the tariffs were sanctioned as an interim means of protecting the network while the agency developed the necessary data to formulate its registration program." 446 F. Supp. at 1102.

Although the court's factual description of the agency's action may be correct, we cannot agree with its legal conclusions. We have explained our interpretation of the Commission's action on the post-*Carterfone* tariffs above. *See* notes 20 & 38, *supra*. Even if the FCC's positions during the 1968-1975 period was ambiguous in some respects, however, *see, e.g., AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d at 872 (on reconsideration), the FCC cannot reasonably be interpreted as having adopted the post-*Carterfone* tariffs as agency policy for purposes of determining antitrust immunity. *See also Northeastern*, 477 F. Supp. at 259-60.

In any event, the district court in *Essential* was reversed. *Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114 (3d Cir. 1979).

44. In a related lawsuit, the FCC has indicated that conduct which it has prescribed or explicitly approved should be entitled to antitrust immunity, but there should be no "blanket immunity" for all conduct embodied in tariffs filed with the FCC and permitted to go into effect. Memorandum of FCC as Amicus Curiae, *reprinted in* 62 F.C.C.2d 1103 (1975). *See United States* v. *American Tel. & Tel. Co.*, 427 F.Supp. 57, 59 (D.D.C. 1976).

45. By contrast, if a plaintiff sued AT&T under the Sherman Act for damages or injunctive relief based on AT&T's implementing the registration program on file with the FCC, such a suit probably would conflict with a considered policy adopted by the FCC. To allow the antitrust action to frustrate the goals of the FCA as defined by the FCC in the registration program would, in the agency's view, involve a plain repugnancy and require antitrust immunity. *Cf. Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 692-93 (9th Cir. 1977) (in context of state regulation), *cert. denied in part*, 434 U.S. 1008, *vacated on other grounds*, 437 U.S. 322 (1978); *Note, supra* note 40, 57 Tex. L. Rev. at 793.

46. The Third Circuit in *Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114 (3d Cir. 1979), held in a similar case that immunity was inappropriate because the plaintiff was a competitor and not a customer of AT&T. The court concluded that the FCA was intended to protect customers of carriers against discriminatory rates and charges but was not designed to regulate the conduct of carriers vis-a-vis competitors. We have some doubt regarding the court's interpretation of the Act's history. Competitors of AT&T have initiated and participated in numerous proceedings before the FCC. *See, e.g.*, Comtronics, Inc., 57 F.C.C.2d 1202 (1976); Computoll Corp.,

56 F.C.C.2d 35 (1975); American Tel. & Tel. Co., 56 F.C.C.2d 14 (1975); United Tel. Co. of the Carolinas, 52 F.C.C.2d 717 (1975); CPI Microwave, Inc., 52 F.C.C.2d 173 (1975).

In a similar vein, several courts, on somewhat different rationales and with varying degrees of analysis, have indicated their doubt concerning the availability or effectiveness of the damages remedy when a competitor sues a regulated entity for violation of the FCA. *See, e.g., Mid Texas,* 615 F.2d at 1380 ("[T]he FCC [is not] empowered to award damages in favor of [an] injured competitor" for violation of FCA); *Nader* v. *FCC,* 520 F.2d 182, 206 (D.C. Cir. 1975) (remedial system incomplete; no damages remedy for competitors) (dicta) (by implication); *Litton Sys., Inc.* v. *American Tel. & Tel. Co.,* 487 F. Supp. 942 (S.D.N.Y. 1980) (damages remedy more useful in theory than practice); *MCI Communications Corp.* v. *AT&T,* 462 F. Supp. 1072, 1088 (N.D. Ill. 1978) (no damages remedy under FCA for injury suffered by competitor) (dicta); *United States* v. *American Tel. & Tel. Co.,* 461 F. Supp. 1314, 1328 n.43 (D.D.C. 1978); *Essential,* 446 F. Supp. at 1100-1102 (FCC's *First Report* not retroactive). *But see Phonetele,* 435 F. Supp. at 213.

Perhaps an authoritative answer to this question is on the horizon. A hearing examiner has awarded damages to a competitor of AT&T for conduct similar to that alleged here. Western States Tel. Co., FCC Docket No. 16883 (Initial Decision of ALJ, released April 13, 1981). It remains to be seen whether the Commission and the courts sustain the award.

Even if we were to accept that competitors had recourse to a remedial scheme under the FCA, and even were we further to accept that there might be different substantive standards, this would fall far short of a showing that the two remedies would be inconsistent. The law is full of instances of conduct that might give rise to two different types of liability, claims, or causes of action, and the difference is not thought synonymous with inconsistency. As even the predicates of this argument are dubious, we will not speculate at length about theoretical conflicts in a remedial vacuum.

There are two reasons for this. First, the Initial Decision in *Western States Telephone* indicates that the standard for any liability would not be inconsistent with straight antitrust analysis, though of course the damages are not trebled. *Id.* at 62-70. Second, the freedom of a party injured by anticompetitive conduct to elect between an administrative FCA remedy and a judicial cause of action under the Clayton Act is quite acceptable; the latter need not derogate or interfere with the former:

> Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice.

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213, 224 (1966).

47. We do note that under some interpretations of the rule of reason, the absence of a damages remedy under the FCA weighs against finding an implied antitrust immunity and gives the antitrust court a role in enforcing the public interest standards of the Act. *See Mid-Texas*, 615 F.2d at 1380.

48. A contrary interpretation might lead to the conclusion that any explicit damages remedy within a regulatory act, whether or not focused solely on antitrust violations, would give rise to antitrust immunity. We refuse, however, to rely so heavily on such a thin reed especially in light of Supreme Court precedents and the Court's repeated admonitions that repeal of the antitrust laws is not to be lightly inferred. *See, e.g., Carnation*, 383 U.S. at 224 (petitioner had option of seeking recovery under either Shipping Act or antitrust laws). It is unlikely that a plaintiff could recover damages under both statutes, *see id.*, so there is no danger of multiple liability.

49. *Cf. Cantor*, 428 U.S. at 594 ("nothing unjust in a conclusion that . . . [defendant's] participation in the decision is sufficiently significant to require that its conduct implementing the decision . . . conform to applicable federal law"); *Northeastern*, 477 F.Supp at 263 (defendant initiated challenged practice "not at the command of the state, but after exercising its own business judgment"); *United States* v. *American Tel. & Tel. Co.*, 461 F.Supp. 1314, 1327-28 (D.D.C. 1978):

> "The allegations of the complaint describe conduct that quite obviously was not stimulated by regulatory supervision or coercion; it is of a character that reflects defendants' business judgment that its profits might be maximized if potential customers were discouraged from entering the various markets AT&T controls."

50. Phonotele's complaint pleaded several matters ancillary to the tariff: It was alleged that AT&T delayed the availability of connecting arrangements for consumers outside California for over three years and charged consumers outside California over three times the monthly service charge for the same service within California without justification. Finally, Phonetele alleged that AT&T deliberately misinterpreted its own tariffs when it required a PCA for the Phonemaster. According to Phonetele, tariff 263 did not cover the Phonemaster. *See* TAN 5-6, p. 3, and notes 5 & 6, *supra*.

Regarding immunity for the ancillary conduct, the FCC may have primary jurisdiction to hear complaints concerning alleged misinterpretation or bad faith implementation of filed tariffs, but we have already concluded that this fact alone does not require implied antitrust immunity.

51. This changed after *Telerent*. *See* TAN 13-14, pp. 5-6, & notes 13, 14, 22, *supra*. Even after 1974, state commissions still retained authority to regulate the rates charged in connection with customer-

provided equipment, and one of the antitrust allegations is that General charged excessive prices, reflected in filed tariffs, in an effort to monopolize the relevant markets.

52. In this vein, the Court has already held that antitrust immunity should not be conferred when a state agency passively accepts a public utility's tariff. *See Midcal*, 445 U.S. at 104. *Cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976) (implied state action). As the Court explained in *Goldfarb* v. *Virgina State Bar*, 421, U.S. 773, 791 (1975), "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."

53. *Cf. Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (state action exemption); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) (same). This is especially the case where the entity claiming the benefit of the state action exemption is not a public corporation, such as a municipally owned utility, but is a private enterprise subject to state regulation. *See City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

54. Other courts which have refused to imply antitrust immunity under the FCA for the activities of AT&T have also held those activities, and parallel measures taken before state utilities commissions, unprotected by the *Parker* doctrine. *See, e.g., Mid-Texas*, 615 F.2d at 1380-81; *Essential*, 610 F.2d at 1125; *Litton Systems*, 487 F. Supp. at 955-57.

55. *But see Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1133 (5th Cir. 1975) (rate approval by city council held sufficiently "sovereign"). Whatever degree of state sanction beyond mere authorization or approval is required by the Supreme Court's cases, *cf. Cantor*, 428 U.S. at 592-93 (state action exemption); *Goldfarb*, 421 U.S. at 790 (same), the CPUC did not adopt or embrace the PCA requirement as state policy beyond the mere fact of permitting General to file the tariff containing the PCA requirement. Thus, the first requirement of *Midcal* is not met in this case.

We do recognize a possible distinction between this case and *Cantor*, in that the CPUC's concern over the safety of the telephone network and its corresponding power to regulate the conditions of interconnection, as well as its concern with rates charged in connection with customer-provided equipment, are at the core of its regulatory concerns, *see* I P. Areeda & D. Turner, Antitrust Law ¶ 214b4 (1978), whereas provision of light bulbs in *Cantor* did not relate to the central purpose of the regulatory agency. We do not mean to suggest that *Parker* immunity never applies to tariffs initiated by the regulated entity. *See* I P. Areeda & D. Turner, *supra*, at ¶¶ 212-215. The CPUC did not, however, express its concern or exercise its power in such a way as to provide immunity for General's conduct.

Professors Areeda and Turner have concluded, albeit "reluctantly," that where there is adequate supervision and clear state intent, regulation of foreign attachments to the telephone system by state utilities commissions probably should be immune from antitrust attack. *See id.* ¶¶ 214b4 & 215b2, at 86-87, 96. This conclusion would appear to apply

equally to regulation by state commissions and also federal commissions such as the FCC. We agree with Professors Areeda and Turner on this issue, but we do not think that our holding will "render inoperable the regulatory programs of most states." *Id.* ¶ 215b2, at 96. We hold only that neither the FCC nor the CPUC intended to adopt the content of the post-*Carterfone* tariffs as federal or state policy, respectively, when they permitted the tariffs to go into effect.

56. It is possible, however, that General may be entitled to antitrust immunity on another ground. Supreme Court and lower court decisions indicate that a defendant's freedom of choice in taking the allegedly anticompetitive action is an important factor in determining whether implied regulatory immunity or immunity under the state action exemption is appropriate. *Cf. Cantor*, 428 U.S. at 592-93 (state action question), *Goldfarb*, 421 U.S. at 790. As we noted earlier in this opinion, when the facilities of an intrastate telephone company are used for interstate communications, they are subject to the tariffs filed by AT&T. To the extent General's decision to require a protective connecting arrangement was dictated by AT&T's tariff revisions filed with the FCC, its own PCA tariff may have been a justified, if not a coerced, compliance with the requirements of the federal and state regulatory schemes. *See* TAN 13-14, pp. 5-6, & note 14, *supra* (relation between federal and state regulatory schemes); TAN 57-67, pp. 22-30, *infra* (dictates of regulatory scheme under which defendant operates may be used to establish a factual defense in particular cases).

57. *International Tel. & Tel. Co.* v. *General Tel. & Elecs. Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975) (footnote omitted). *See also Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 381-82 (1973):

> We do not suggest, however, that the District Court, concluding that Otter Tail violated the antitrust laws, should be impervious to Otter Tail's assertion that compulsory interconnection or wheeling will erode its integrated system and threaten its capacity to serve adequately the public. . . . Since the District Court has made future connections subject to Commission approval and in any event has retained jurisdiction to enable the parties to apply for "necessary or appropriate" relief and presumably will give effect to the policies embodied in the Federal Power Act, we cannot say under these circumstances that it has abused its discretion."

58. The defendants might, for example, attempt to demonstrate why methods of protecting the system which did not depend on particularized knowledge about the technical specifications of all types of equipment that might be interconnected, would have been either inadequate or not reasonably foreseeable. One such method is suggested by the FCC-proposed tariff in 1975, namely the requirement that those desiring to connect foreign equipment first notify the telephone company with the provision that the telephone company could temporarily discontinue service to any customer whose equipment was causing actual harm to the telephone network. *See First Report*, 56 F.C.C.2d at 611-12.

59. Counsel for General assert that in *Carterfone* "[t]he FCC *ordered* the telephone companies to submit new tariffs [to protect the telephone system]" (emphasis added). The words of the Commission are at no point in the decision ambiguous as to this issue and simply will not bear this interpretation:

> In view of the unlawfulness of the tariff there would be no point in merely declaring it invalid as applied to the Carterfone and permitting it to continue in operation as to other interconnection devices. This would also put a clearly improper burden upon the manufacturers and users of other devices. *The appropriate remedy is to* strike the tariffs and *permit the carriers, if they so desire, to propose new tariff provisions* in accordance with this opinion. We make no rulings as to damages since that relief has not been requested. As noted above, *the carriers may submit new tariffs* which will protect the telephone system against harmful devices, *and may specify technical standards if they wish.*

Carterfone, 13 F.C.C.2d at 425-26 (footnote omitted) (emphasis added).

The *Carterfone* decision offered AT&T a choice between action and inaction. In our view, section 203 of the FCA does not require a carrier to file a tariff describing an omission to act. Even if such a statutory requirement had existed, the mere compulsion to file a descriptive tariff would not in any way have justified the filing of a restrictive tariff. The defendants do not argue that they were compelled to resist interconnection by the possibility of liability for any damage caused by uncontrolled interconnection. *See* TAN 64-65, pp. 27-28, & note 64, *infra* (discussing *Mid-Texas)*.

60. This court in *Moore* rejected a claim for immunity based on state regulation, but it is not clear from the *Moore* opinion precisely what argument the panel rejected. The briefs in that case reveal that the defendants-appellees argued only that an Oregon statute which authorized, but did not require, cemeteries to promulgate rules in very general terms could be interpreted to cover the challenged tying practices. *Moore* is distinguishable on this point because the defendants-appellees in that case offered a conjectural and wholly state law ground as a justification. Here we are dealing with a state regulation that is in many ways an appendage of the dominant federal regulatory program. We are also not permitting conclusory assertions of conjectural regulatory justification, as in *Moore*, but are only allowing an opportunity to prove a narrowly defined type of regulatory necessity as a concrete matter of fact.

Finally, we think dictum in the *Cantor* opinion, on which the *Moore* panel relied heavily, strongly supports our view. After acknowledging the severe penalty of the treble-damages provision of the antitrust laws, the Court stated:

> The concern about treble-damage liability has arguable relevance to this case in two ways. If the hazard of violating the antitrust laws were enhanced by the fact of regulation, or if a regulated company had engaged in anticompetitive conduct in

> reliance on a justified understanding that such conduct was immune from the antitrust laws, a concern with the punitive aspects of the treble-damage remedy would be appropriate. But neither of those circumstances is present in this case.

428 U.S. at 599. Thus, were the Court to encounter a case presenting a justifiable reliance on the perceived dictates of a state or federal regulatory scheme, some measure of relief from the antitrust laws would probably result. We have decided that such relief should be incorporated into the standard of antitrust liability.

61. *See, e.g., Travelers Ins. Co.* v. *Blue Cross of W. Pa.*, 361 F. Supp. 774, 780 (W.D. Pa. 1972), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973). *Cf. International Rys. of Cent. America* v. *United Brands Co.*, 532 F.2d 231, 240 (2d Cir.) (consent decree had eliminated "monopolist's" power to control prices), *cert. denied*, 429 U.S. 835 (1976).

62. The Court found the requirement completely unjustifiable and struck it as violative of the Sherman Act mainly due to the lack of procedural safeguards accompanying the deprivation of the private wire service. 373 U.S. at 361.

Similarly, in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), the government challenged under section 7 of the Clayton Act a merger between two banks based on the potential competition doctrine. Noting the "extensive federal and state regulatory barriers to entry into commercial banking," the Court specifically held that "the application of the [potential competition] doctrine to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of commerce." *Id.* at 627-28 (footnote omitted).

63. The *Jacobi* case dealt with self-regulation by the New York Stock Exchange, under the Securities Exchange Act. We are aware that the *Jacobi* panel relied on *Silver*, and placed on the plaintiff the burden of showing that the challenged conduct of the regulated entity was neither "germane" to the purposes of the Securities Exchange Act nor consistent with reason. *See* 520 F.2d at 1239. The *Silver* Court, however, did not go so far as to detail what standard of proof might be applied to a proferred regulatory defense and where the burden of proof might lie. *See* 373 U.S. at 366.

While the *Silver* Court located its action under the "aegis of the rule of reason," *id.*, at 360, it also spoke of a regulatory justification "in answer to the assertion of an antitrust claim," *id.* at 361, and of the "interposing" of such a justification, *id.* at 366. Thus, although we agree with the Second Circuit's choice of a standard of reasonableness, we read *Silver* to imply that the burden of maintaining a regulatory justification lies on the defendant. We think this allocation of the burden (1) minimizes the distortion of the elements of substantive antitrust violations that would result were we to attempt to apply a "rule of reason" analysis beyond the scope of section 1 and (2) places the burden of production on the party with the best access to evidence and expertise. Accordingly, our allocation is consistent with our desire to

avoid undue interference with plaintiffs' exercise of their right to seek the protection of the "fundamental national economic policy" represented by the antitrust laws, *see National Gerimedical Hospital* v. *Blue Cross*, 49 U.S.L.W. 4672, 4676 (U.S. June 15, 1981), (quoting *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973)), while accommodating fairness by permitting regulated entities "breathing space" between the dictates of the regulatory regime and the antitrust laws. *See Silver*, 373 U.S. at 360.

The Initial Decision in *Western States Telephone* makes a similar point:

> Contrary to the arguments of the telephone company defendants, the burden of establishing that the Western States telephones were harmful to the telephone system was on the defendants. In this connection, the Commission made clear in Docket 19528 *First Report and Order*, 56 FCC 2d 593, 596 that the *Carterfone* decision "placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate that a particular unit or class of customer-provided equipment would cause either technical or economic harm to the telephone network . . ." Thus, while the designation order in this case placed the burden of proof on the question of damages on Western States, the order placed the question of harm from interconnected equipment on the carrier. (See 62 FCC 2d 1070, 1071 (1977)). Hence, defendants' arguments to the contrary are rejected. It appears clear that the defendants were in the best position to establish either the presence or absence of harm arising from the Western States telephones. They had access to the information pertinent to a resolution of such question. *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 284-285 (1966). *Referral of Chastain* v. *AT&T*, 49 FCC 2d 749, 751 (1974).

Western States Telephone Co., FCC Docket No. 76883, slip op. at 59-60 (Initial Desision of ALJ, released April 10, 1981).

64. Other courts have reached similar conclusions. Although the Fifth Circuit found some sort of duty to resist interconnection by other carriers if perceived not to be in the public interest, this was not based on any extensive analysis of authority, and is in any event of only tenuous relevance here as the court was interpreting a subsection of the FCA fundamentally different from that before us; interconnection of carriers is massive compared to that of most individual subscribers, and both the effects on the network and the carriers' regulatory duties may be substantially different from those involved in this appeal. *See Mid-Texas*, 615 F.2d at 1380-81. *Cf.* TAN 58-59, pp. 23, note 59, *supra* (no duty to file post-*Carterfone* tariff imposed by *Carterfone* decision).

65. The Eighth Circuit, in *Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980), implicitly adopted a similar view when it denied a telephone company antitrust immunity and designated for fact-finding at trial the question whether the company adopted a PCA requirememt because it did not know how otherwise to protect the

integrity of its own equipment. *See id.* at 1330 n.7. The Second Circuit has made a jury question of the propriety of the design of a PCA in an antitrust case challenging the design of the PCA, but not the filing of the underlying tariff. *See Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981).

66. In *GT&E*, implied immunity was not at issue, and GT&E did not even attempt to demonstrate that the dictates of the regulatory scheme imposed on it an obligation, either actual or perceived, to acquire the telephone companies. Rather, the sole claim was grounded in the advantages gained through vertical integration, an issue irrelevant even "in the absence of any regulation whatsoever." *GT&E*, 518 F.2d at 935. Since nothing unique or peculiar to the regulatory system caused, either directly or tangentially, the defendant's conduct, there was no reason to skew the doctrinal scheme of the antitrust laws.

67. The Supreme Court apparently has taken a similar view in *National Gerimedical Hospital* v. *Blue Cross*, 49 U.S.L.W. 4672 (U.S. June 15, 1981), where, after refusing to accord Blue Cross implied antitrust immunity on the basis of its claim to have been acting to further the purposes of the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 3001, the Court noted that litigation on the merits should give attention to the "particular economic context" in which the alleged antitrust misconduct occurred. *See National Gerimedical*, 49 U.S.L.W. at 4676 n.19.

J. CLAIBORNE *(dissenting)*:

The cases of *DASA Corporation, etc.* v. *General Telephone Co. of California, et al.* (No. 77-2936) ["DASA"] and *Phonetele, Inc.* v. *American Telephone and Telegraph Co., et al.*, (No. 77-3877) ["Phonetele"] present the same issue: Is American Telephone & Telegraph Co. and its operating companies ["A.T. & T."] immune from liability under the Sherman Act (15 U.S.C. §§ 1 et. seq.) with respect to competing manufacturers of "interconnection equipment" because of the way in which they are regulated by the Federal Communications Commission ("F.C.C.")? This issue has been heavily litigated of recent, and Courts and commentators are sharply divided. See generally, Note, *AT&T and the Antitrust Law: A Strict Test for Implied Immunity*, 85 Yale L.J. 254 (1975); *Essential Communications Systems, Inc.* v. *A.T. & T.*, 446 F. Supp. 1009 (D.N.J. 1978), *revd.*, 610 F.2d 1114 (3rd Cir. 1979); *Litton Systems, Inc.* v. *A.T. & T.*, No. 76 Civ. 2512 (WCC) [in which District Judge Conner of the Southern District of New York declined to follow the 270 page recommendation of Magistrate Sinclair on this issue].

I.

Phonetele manufacturers the "Phonemaster," which is a special purpose mini-computer, designed specifically to interface with the national telephone network. Phonetele installs the Phonemaster on the customer's premises, at his/her telephone terminal. The Phonemaster then controls the amount of telephone service by restricting outgoing calls to selected area codes, exchange prefixes, and lines; it does this by electronically observing the outgoing dial signals, translating them, comparing them to a core memory, and then allowing or disallowing the call based upon the consumer's programmed restrictions. The Phonemaster, unlike the terminal, operates on 110 volt current.

DASA manufactures a telephone call diverter known as "Divert-a-Call." A call diverter can automatically transfer each

incoming telephone call at one particular number to any other designated telephone anywhere within the United States or Canada.

The nation's telephone system consists of a switch network that links the facilities of more than 1,700 cooperating telephone companies extending throughout the country. The four basic elements of this network are the terminal equipment (such as the telephone itself located on the customer's premises), the pair of wires or "loop" that connects the telephone set to the central office, the switching equipment, and the trunk facilities that connect the central offices to each other. "Network control signals" are electronic impulses which activate the devises that set up and take down connections between centers, control switches, and start and stop the equipment used for billing. Devices that generate or activate network control signals are a category of terminal equipment known as "network control signaling units," or "NCSU's." Automatic transfer devices such as "Divert-a-Call" and "Phonemaster" are NCSU's. Such devices if not carefully designed, manufactured, installed, and/or maintained, can cause improper signals to be received at the central office, thereby disrupting systems operations and message accounting.

In 1966, the F.C.C commenced its *Carterfone* proceedings with respect to A.T. & T. Tariff 132, which blanked and unqualifiedly prohibited customer-provided equipment. In 1968, the F.C.C. concluded that Tariff 132 was overbroad as applied to ancillary devices such as the Carterfone, which was not an NCSU but which merely provided a means of achieving a form of interconnection between the public toll telephone system and private mobile radio systems by acoustic and inductive coupling. *Use of the Carterfone Device in Message Telephone Service*, 13 F.C.C. 2d 420 (1968). The F.C.C. ordered the telephone companies to submit a new tariff which would protect the telephone system against harmful devices and, in response thereto, A.T. & T. submitted Tariff No. 263, which became effective on January 1, 1969. This tariff permitted acoustic and inductive connections

under specified conditions, and continued to prohibit direct electrical connection of customer-provided NCSU equipment, unless a customer wished to use indirect interconnection through a coupling arrangement furnished and maintained by the telephone company. Immediately after filing of the same, several parties filed objections thereto; however, the F.C.C. rejected these objections, holding that Tariff No. 263 was not in conflict with the prior *Carterfone* ruling. 15 F.C.C. 2d 605; 18 F.C.C. 2d 871. In its decision permitting revised tariff No. 263 to go into effect, the F.C.C stated that it would undertake an extensive study to ascertain whether any modifications or limitations on the interconnection of customer-provided NCSU equipment where necessary, desirable and technically feasible.

Accordingly, the F.C.C. commissioned a study of the whole matter of interconnection by the National Academy of Sciences (cf. 18 F.C.C. 2d 871) and ordered a Federal-State Joint Board investigation of interconnection in cooperation with the state regulatory agencies under 47 U.S.C. § 410(c) (cf. 35 F.C.C. 2d 539). Additionally, both the National Association of Regulatory Utility Commissioners ("NARUC") and at least 17 different state commissions—including California—undertook their own independent investigations of this same problem during the same period. This led to an order by the F.C.C. in which it asserted "paramount" jurisdiction over the terms and conditions governing the interconnection of all equipment used in interstate communications thereby permitting the F.C.C. effectively to limit the options available to the States in this area. *Telerent Leasing Corp.* 45 F.C.C. 2d 204, *affd., sub. nom., North Carolina Util. Comm'n.* v. *F.C.C.*, 537 F. 2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976).

Based on a Report and recommended Order of the Federal-State Joint Board and after several revisions thereof the Commission released its First Report and Order on November 7, 1975, adopting a federal registration program for the regulation of interconnection of customer-provided devices. 56 F.C.C. 2d 593.

The Commission noted that former Tariff No. 263 was one manner in which to protect the network, but concluded that the approach of that tariff was unnecessarily restrictive in view of the Commission's finding that it would be technically and administratively feasible to establish a system of equipment registration which would provide the necessary minimal protection against network harm. If so registered with the F.C.C., such equipment no longer requires a protective connecting arrangement; but if not so registered, the telephone companies may continue to require the use of a protective connecting arrangement for the interconnection of NCSU's. The federal registration program promulgated by the F.C.C. is set forth in Sub-part 68 of the F.C.C.'s regulations (47 C.F.R. §§ 68.100 et. seq.). A.T.&T. subsequently filed a revised tariff with the F.C.C. which purportedly reflects the requirements of the F.C.C.'s registration program. The new registration program will be subject to continuing review and modification by the Commission as actual experience under the program warrants. 56 F.C.C. 2d at 613.

Developments before the California Public Utilities Commission ("P.U.C.") have loosely paralleled those before the F.C.C. General Telephone tariffs filed with the P.U.C. prior to 1966 prohibited the connection of customer-provided equipment to the telephone system. In 1966, the P.U.C. found a call diverter functionally similar to the Divert-a-Call not to present any significant hazard to the telephone system and the P.U.C. ordered General Telephone to allow interconnection of that device without a connecting arrangement or to purchase and supply the device itself. DASA's predecessor-in-interest, Com-U-Trol, filed an action before the P.U.C in February of 1972, to compel General Telephone to allow interconnection of the Divert-a-Call. Although the P.U.C. ordered that General "shall permit the direct electrical connection of Divert-a-Calls to the telephone network subject to the condition that complainant shall provide reasonable assurances that quality control, installation, and repair procedures . . . necessary for the preservation of network integrity and safety will be uniformly followed," Com-U-Trol

and General were unable to come to agreement on the necessary procedures. Subsequently, on October 24, 1973, the P.U.C. commenced a general investigation into the terms and conditions of interconnection of customer-provided equipment. On April 22, 1975, the P.U.C. issued an Interim Decision, which was eventually finalized in May, 1976 and which, like the F.C.C. *First Report*, adopted a dual system of direct electrical connection of certified devices and the use of protective connecting arrangements for uncertified devices.

The Communications Act of 1934, or Title 47, Chapter 5 of the United States Code, contains the statutory scheme by which the federal government regulates wire communications. The Act specifically confers jurisdiction over "all instrumentalities, facilities, and apparatus . . . incidental to interstate communications services upon the Federal Communications Commission." 47 U.S.C. §§ 151,153(a), 153(e). Under this regulatory scheme, Appellees, like other common carrier enterprises, are required to file tariffs describing all rates and practices, including the terms and conditions for the interconnection of customer-provided equipment, before service can be offered to the public. Cf. 47 U.S.C. § 203(a). No changes can be made in the tariffs once they are filed and published, except after ninety (90) days notice to the F.C.C. and to the public (47 U.S.C. § 203(b)(1)), unless the Commission exercises its discretion and does so pursuant to 47 U.S.C. § 203(b)(2). The Commission may not prescribe a new rate or practice contained within a telephone company tariff without first granting a full opportunity for a hearing before it. 47 U.S.C. § 204(a); *A.T.&T.* v. *F.C.C.*, 487 F. 2d 865, 874 (2nd Cir. 1973). The Commission has the authority to institute an inquiry on its own motion with respect to matters raised before it (47 U.S.C. § 403), and whenever it conducts an investigation it has the duty to state its conclusions in writing (47 U.S.C. § 404). The Commission also has the power to refer any matter arising in the administration of the 1934 Act to a joint board to be composed of members from each of the states in which the wire

communication affected by or involved in the proceeding takes place or is proposed, pursuant to 47 U.S.C. § 410, which power the F.C.C. in fact exercised in the case at bar.

After such a hearing, the F.C.C. is empowered with the duty to determine what the just and reasonable charge or the just, fair and reasonable classification, regulation or practice shall be and to make cease and desist orders accordingly. In other words, if the agency concludes that the tariff is not in compliance with the Act or regulations thereunder, it must order the tariff cancelled or modified as the circumstances warrant. 47 U.S.C. § 205(a). If the agency accepts the tariff and permits it to become effective, the regulatory statutes specifically require the carriers to enforce the tariff fully and fairly unless and until it has been superseded by a new tariff filed and reviewed under this same procedure. 47 U.S.C. § 203(c).

The standard under which the F.C.C. acts in administering the Act is not the standard of "free and unfettered competition," upon which the Sherman Act is premised (cf. *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 517, 2 L. Ed. 2d 545 (1958)) but a standard broader than that, namely, the standard of protecting the public interest in communications. Cf. *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 14, 62 S. Ct. 875, 882, 86 L. Ed. 1229 (1942). By this, it is meant that all charges, practices, classifications and regulations for and in connection with such communication service shall be just and reasonable. 47 U.S.C. § 201(b). Thus, antitrust considerations may be relevant to the F.C.C.'s determination of the legality of a tariff under this Chapter, but they are not determinative, except where 47 U.S.C. § 202 applies directly; other factors which the F.C.C. takes into account in determining the "public interest" include network safety and efficiency, the need of the public for reliable service at reasonable rates, the proper allocation of the rate burden in the public interest, the financial integrity of the carriers, and the future needs of both the users and carriers. Compare 62 F.C.C. 2d 997 (1977); 59 F.C.C. 2d 344 (1976); 34 F.C.C. 949

(1963); 17 F.C.C. 152 (1952); 10 F.C.C. 244 (1943); and see *Mid-Texas Communications* v. *American Tel. & Tel. Co.*, 615 F. 2d 1372, 1379 (5th Cir. 1980), and cases cited therein.

Where a common carrier violates this standard or omits to do anything which is required by the Act to be done, it can be liable to the person(s) injured thereby for damages plus attorney's fees. 47 U.S.C. § 206. Jurisdiction is in the United States District Courts or with the Commission, but not both simultaneously. 47 U.S.C. § 207. In fact, the F.C.C. currently has pending before it a reactivated proceeding involving alleged damages resulting from the post-*Carterfone* interconnection tariffs. *Western States Tel. Co.* v. *A. T. & T.*, 19 F.C.C. 2d 1068 (1969), 62 F.C.C. 2d 1170 (1977). The District Courts have jurisdiction to enforce any orders of the F.C.C. pursuant to 47 U.S.C. § 401.

III

Both appellants are relatively new businesses, having spawned in the early 1970's as a result of the post-*Carterfone* events heretofore described. Phonetele and DASA both filed their actions in 1974. The essence of Phonetele's complaint is that the defendants have conspired to limit sales of the Phonemaster by restricting the manner in which the device can be "interconnected" with the national telephone system. While the complaint does not specifically so state, Phonetele must concede as a matter judicially noticeable that the sole means by which Appellees have allegedly done so is by the filing of the tariffs heretofore described. DASA apparently alleges that General Telephone and Ford Industries, Inc. (Ford) a manufacturer of a competing call diverter for General Telephone, have conspired to eliminate competition for the production, sale and leasing of automatic call diverters; that General has filed "anticompetitive" tariffs with the P.U.C. with the purpose of eliminating and restraining competition in the field of peripheral telephone equipment; that after such tariffs were determined to be unlawful, General unnecessarily required a coupler supplied by it for the attachment of the Divert-a-Call to the telephone system; that the charges for these couplers

were unreasonable; that the couplers were designed to prevent the proper functioning of the call diverters; that General and co-conspirators sought to prevent DASA from obtaining rulings from the P.U.C. and other public bodies as to the validity of tariff provisions relating to the inter-connection of customer-provided terminal equipment; and that General conspired with Ford so that Ford would be able to control the market for call diverters.

The District Court in both cases below granted the Appellees' motion for judgment on the pleadings/motion to dismiss on the grounds that the subject of interconnection of terminal equipment with the telephone network system is impliedly immune from antitrust attack in the federal courts. *Phonetele, Inc.* v. *A.T. & T.*, 435 F. Supp. 207, 214 (C.D. Cal. 1977). These appeals follow.

A.

The starting point for any consideration of the issue at bar[1] are the well settled principles that repeal of the antitrust laws by implication is not favored and not casually to be allowed; only where there is a "plain repugnancy between the antitrust and regulatory provisions" will repeal be implied. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351, 83 S. Ct. 1715, 1734-1735, 10 L. Ed. 2d 915 (1963), and cases cited therein. Repeal is to be regarded as implied only if necessary to make regulatory provisions work, and even then only to the maximum extent necessary. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L. Ed. 2d 389 (1963).

While these principles tend to lead in the direction of the majority opinion, they cannot be considered in a vacuum. Rather, one must examine them in operation in recent Supreme Court cases, and see where this case fits within the spectrum already established by the Supreme Court. The four most recent Supreme Court opinions on the issue of implied antitrust immunity are: *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 463 (1975); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 95 S. Ct.

2427, 45 L. Ed. 2d 486 (1975) ["NASD"]; *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973); and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct., 3110, 49 L. Ed. 2d 1141 (1976). After reading these cases and gleaning their intelligence, I believe that any Court faced with the issue at bar must ask the following questions: 1) Has Congress conferred upon the regulatory agency sufficient authority to regulate the conduct which is alleged to be anticompetitive? 2) Does the history of the regulatory agency's activities with respect to the regulation of this conduct suggest no laxity in the exercise of this authority? 3) If the federal antitrust laws were to be construed by a federal court as outlawing the regulated activity, is there reason to believe that the agency's regulation of the industry in question will no longer be able to function effectively? If a Court answers all three questions in the affirmative, then it must find implied immunity and dismiss the antitrust action.

The *Gordon* case involved an action against the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX) and two member firms thereof, claiming that the system of fixed commission rates utilized by the Exchanges for the periods of time in question violated §§ 1 and 2 of the Sherman Act. The Supreme Court affirmed the dismissal of the complaint. First, the Court noted that the general policy of the Securities Exchange Act of 1934 was of self-regulation by the exchanges coupled with oversight by the Securities and Exchange Commission (S.E.C.). 422 U.S. at 666-667; 95 S. Ct. at 2603-2604. The Court then thoroughly examined the actual post-1934 experience of S.E.C.-imposed rates on the NYSE and AMEX; to summarize, the S.E.C. gradually abolished said rates between 1934 and 1975, refusing to take the position that fixed rates were required in all instances, but recognizing the established practice of minimum rates and the practicality that some level of fixed rates was necessary for a large period of time in order to insure the financial health of the brokers in question and that an immediate withdrawal of minimum rates could have disastrous

financial consequences upon the brokers as well as indirect but consequential harm to investors. The Court also noted that Congress, while expressing some dissatisfaction with the progress of the S.E.C. in implementing competitive rates, was generally content to allow the S.E.C. to proceed without new legislation. 422 U.S. at 668-682; 95 S. Ct. at 2606-2611. The Court then stated:

> . . . [T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. It is clear from our discussion . . . that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the S.E.C. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the S.E.C. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the S.E.C. must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Given the expertise of the S.E.C., the confidence the Congress has placed in the agency, and the active roles the S.E.C. and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement the scheme.

422 U.S. at 689-690; 95 S. Ct. at 2614-2615.

The *NASD* case involved, *inter-alia*, an alleged conspiracy and horizontal combination among NASD's members to prevent the growth of a secondary dealer market in the purchase and sale of mutual-fund shares.[2] Section 22(f) of the Investment Company Act of 1940 authorizes mutual funds to impose restrictions on the negotiability and transferability of shares, provided they conform with the fund's registration statement and do not contravene any

rules and regulations that the S.E.C. may prescribe in the interests of the holders of the outstanding securities. Section 22(d) provides that no dealer shall sell mutual fund shares to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus. The Maloney Act of 1938 (§ 15A of the Securities Exchange Act of 1934) supplements the S.E.C.'s regulation of over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers. In affirming the dismissal of the complaint as to Count I, the Supreme Court held that where Count I alleged activities which were neither required by Section 22(d) nor authorized by Section 22(f), but where the S.E.C.'s supervisory powers over the NASD is extensive, and weighs competitive concerns as a factor in regulating the secondary market of mutual funds shares purchases and sales, Count I is immune from antitrust liability. 422 U.S. at 730-733; 95 S. Ct. at 2428-2429. In particular, the Court stated:

> There can be little question that the broad regulatory authority conferred upon the S.E.C. by the Maloney and Investment Company Acts enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority. To the extent that any of appellees' ancillary activities frustrate the S.E.C.'s regulatory objectives it has ample authority to eliminate them.
>
> Here implied repeal of the antitrust laws is necessary to make the regulatory scheme work. [cite] In generally similar situations, we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. [cites] In this instance, maintenance of an antitrust action for activities so directly related to the S.E.C.'s responsibilities poses a substantial danger that appellees would be subjected to

> duplicative and inconsistent standards. This is hardly a result that Congress would have mandated. We therefore holed that with respect to the activities challenged in Count I of the complaint, the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts.

422 U.S. at 734-735; 95 S. Ct. at 2450.

In *TWA*, the appellee brought an antitrust action against Hughes Tool Co. (Toolco) and others under the Sherman Act as a result of the manner in which Toolco had exercised its controlling interest in TWA, with particular reference to Toolco's asserted acts to control and dictate the acquisition and financing of aircraft by TWA. As an organization engaged in phases of aeronautics, Toolco could not acquire control of an air carrier such as TWA without consent of the Civil Aeronautics Board (C.A.B.). In 1944, the C.A.B. approved de facto control of TWA by Toolco as comporting with the provision of § 408 of the Federal Aviation Act. That provision permits acquisitions of control that the C.A.B. finds are not inconsistent with the public interest and that will not result in monopoly. Section 415 of the Act endows the C.A.B. with the power to supervise all transactions between carriers and their owners on a continuing basis. And, Section 414 immunizes any conduct approved by a C.A.B. order issued under § 408 from antitrust liability. The C.A.B., after full hearings into the Toolco-TWA relationship, found that Toolco's financial and other support was of great importance to TWA and concluded that the continued interest of Toolco in TWA appears to be essential to the best interests of the carrier and the public. The C.A.B.'s approval was made subject to the conditions of the 1944 order. As a result, from 1944 to 1960, every acquisition and lease of aircraft by TWA from Toolco and each financing by TWA from Toolco received C.A.B. approval pursuant to § 408.

The Supreme Court reversed a default judgment in favor of TWA, holding that the conduct of Toolco was impliedly immune from the sanctions of the antitrust laws. Appellants herein seek

to distinguish this case and the case upon which the Supreme Court based its ruling in *TWA, Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963), on the basis that the Communications Act of 1934 does not have provisions similar to Sections 408 and 414 of the Federal Aviation Act. While this fact is true, the distinction is without a difference since it is clear that the *TWA* Court did not base its holding or restrict its holding to a strict interpretation of those two sections. Rather, the Court stated:

> Competition and monopoly—two ingredients of the antitrust laws—are thus standards governing the CAB's exercise of authority in granting, allowing, or expanding or contracting the control which Toolco had over TWA by reason of the various orders issued by the CAB under § 408. In this context, the authority of the Board to grant the power to "control" and to investigate and alter the manner in which that "control" is exercised leads us to conclude that this phase of CAB jurisdiction . . . preempts the antitrust field.

409 U.S. at 385; 93 S. Ct. at 659-660.

> We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws . . . One of the most conspicuous exceptions would be the combination or agreement between two air carriers involving trade restraints. [cite] There may be other exceptions. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws.

409 U.S. at 387, 93 S. Ct. at 661.

Finally, in *Cantor*, the respondent, a private utility which was the sole supplier of electricity in southeastern Michigan, also furnished its residential customers, without additional charge, with almost 50% of the most frequently used standard-sized light bulbs under a longstanding practice antedating state regulation of electric utilities. This marketing practice for light bulbs is approved, as part of respondent's rate structure, by the Michigan Public Service Commission, and may not be changed unless and until respondent files, and the Commission approves, a new tariff. The Supreme Court held that the respondent's marketing practice was not immune from antitrust liability, stating:

> Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired. We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.

428 U.S. at 598; 96 S. Ct. at 3121.

With these four cases, the statutory scheme and the activity of the F.C.C. in regulating the interconnect industry in mind, it is readily apparent to me that the three aforementioned questions must be answered in the affirmative. On this basis, then, I respectfully dissent.

As to the first question, Congress has given the power to private individuals to sue A.T. & T. and its operating companies for damages where it implements a tariff which constitutes an unjust

or unreasonable practice. As heretofore stated, the standard of "unjust and unreasonable" can include but is not necessarily restricted to anticompetitive practices.

As to the second question, it is clear that the F.C.C. has taken an active interest in regulating the entire field of interconnection, to the point of preempting the state public utility/service commissions in this regard. And, after seven years of concentrated study, it has adopted a "middle ground." That is to say, it has neither adopted A.T. & T.'s position of totally restricted competition nor Appellants' position of totally unfettered competition, but a registration program which is designed to protect the companies with sound interconnection products against the tariff practices of A.T. & T. and simultaneously to protect A.T. & T. and the public from companies with unsound interconnection products.

As to the third question, since the Court is to deal in theoretical possibility, I must conclude that circumstances could exist whereby the judgment of a federal court would disenable the F.C.C. to function effectively in this particular field of regulation. If I assume for the time being that Phonemaster's requirement of 110-volt current to operate must require a coupling arrangement which requires A.T. & T. engineering expertise, and if I assume for the time being that Divert-a-Call is or will become a hazard to the network system and cause both annoyances to the customers and disruption to A.T. & T.'s billing procedures, then it becomes obvious that the F.C.C. should have the power to prevent or restrict Appellants' ability to compete in the marketplace; the public interest would require no less. However, anticompetitive practices on the part of A.T. & T. could constitute *per se* violations of the Sherman Act and thereby require that Appellants be allowed to compete and A.T. & T. pay treble damages. Of course, these assumptions may well prove to be totally without foundation in time. However, the point is clear: this is not a case of a public utility commission whose legislative mandate clearly has nothing to do with the regulation of the light bulb sales industry, as in *Cantor*. The F.C.C. is to act in the public interest

in the regulation of the communications industry, and the history surrounding this action indicates that the F.C.C. has deemed the public interest in the interconnect industry to be vital. Whether wisely or not, it has formulated a plan by which to regulate that industry, and an antitrust judgment could well indeed make a mockery of that plan.

B

I am aware that in urging the affirmance of the Courts below I would create a conflict, in that the Third Circuit in *Essential, supra,* faced with the same precise issue and the same operating facts, held that A.T. & T. and its operating companies could not be shielded impliedly from antitrust immunity. After studying that opinion, however, and with all due respect for the Third Circuit, I simply find it to be unpersuasive, especially in light of *Gordon* and *NASD* and the total lack of attention which the *Essential* Court gave to those two cases.

In arriving at its holding, the *Essential* Court drew a distinction between a customer for communications services and a competitor for communications services. The Court reasoned that the F.C.C. has the primary responsibility to insure that enforcement of the common carrier's duty to offer service to all who seek it on reasonable terms and conditions, but the federal courts, not the F.C.C., has the primary responsibility for the enforcement of antitrust laws which implies the permission of potential competitors in communications services to have access to the Bell System network. 610 F. 2d at 1122.

It is difficult to glean the authority from which the *Essential* Court derived that distinction; most certainly, it did not derive the distinction from the *NASD* and *Gordon* cases, which involved alleged restrictions of competitors of the regulated industries in question and nonetheless found implied antitrust immunity to exist. It appears from the *Essential* opinion that that Court derived the distinction from some dictum in *Keogh* v. *Chicago &*

Northwestern Ry. Co., 260 U.S. 156, 161-163, 43 S. Ct. 47, 49-50, 67 L. Ed. 183 (1922), involving an action against a shipper who had filed tariffs with the I.C.C. by a customer.

In this regard the *Essential* Court plainly misread *Keogh*, as that case had nothing to do with the doctrine of implied antitrust immunity. The holding of *Keogh* is that a railroad shipper may not bring an action under 15 U.S.C. § 15 for rebate of rates found by the I.C.C. to be reasonable and nondiscriminatory and fixed accordingly; this holding is clearly a resolution of a conflict between the Interstate Commerce Act and the Clayton Act. Cf. 260 U.S. at 162-163, 43 S. Ct. at 49. The *Keogh* Court did say, though, that under 15 U.S.C. §§ 1 et. seq. a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal, and this would be actionable under the antitrust laws. Cf. 260 U.S. at 161-162; 43 S. Ct. at 49.

I do not think that an "implied immunity distinction" can be read into *Keogh*, since that case dealt not with the pervasive regulation of a regulatory agency with broad powers, as here, but statutory construction with respect to specifically defined powers of a regulatory agency. To the extent that I am wrong in that regard, however, it is correct to say that the Supreme Court rendered the "*Keogh* distinction" meaningless ten years later in *United States Navigation Co., Inc.* v. *Cunard S. S. Co., Inc.*, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408 (1932). *Cunard* involved an antitrust action against shippers who allegedly conspired to fix general tariff rates and establish lower contract rates for shipping among the general members with the intent of driving the plaintiff, a competitor, out of business. In other words, in the lingo of the *Essential* Court, this action involved not customers of a regulated industry, but competitors. Nonetheless, the Supreme Court affirmed the dismissal of the action. Noting that this matter as well lay within the jurisdiction of the I.C.C. under the Shipping Act (49 U.S.C. §§ 801 et. seq.), the *Cunard* Court actually extended, as opposed to distinguished the *Keogh* opinion as follows:

> A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions, or are so interrelated with such charges as to be, in effect, a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare *Keogh* v. *C & N. W. Ry. Co.* [cite omitted]. The matter therefore is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, is demonstrative of this conclusion . . . .

284 U.S. at 485; 52 S. Ct. at 250-251. See also *far East Conference* v. *United States*, 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576 (1952).

While that was the holding of the *Essential* Court, three other factors appeared to play a part in that Court's *ratio decidendi:* first, that nothing in the 1934 Act explicitly directs the F.C.C. when exercising its authority to take into account antitrust considerations (610 F. 2d at 1120); second, the statutory scheme also includes a "savings clause, Section 414, which, combined with 47 U.S.C. § 221(a), conferring express immunity from antitrust litigation in a situation not applicable herein, demonstrates that no blanket immunity from antitrust law was intended by Congress (610 F. 2d at 1120); and third, that in the *Essential* Court's opinion, the fact that the F.C.C. suspended its judgment on the question of interconnection did not rise to the level of agency activity requiring a finding of implied immunity (610 F. 2d at 1124).

The first and the third factors fly in the face of the *Gordon* and the *NASD* opinions. Neither statutory scheme in those cases involved a specific statute which required the S.E.C. to consider competitive considerations in regulating the broker-dealers in question; yet, the Supreme Court demonstrated that the history

and practice of that regulatory agency was to consider that factor, along with other factors, in determining the public interest. So it is here. And, the F.C.C. suspended its judgment with respect to the enormous problem of interconnection for a period of time exceeded by the S.E.C.'s suspension of its judgment pending further study and review in *Gordon;* yet, all nine justices of the *Gordon* Court were satisfied that the S.E.C. was active enough in the regulation of broker commission rates to find implied immunity therein.

The second factor states the key argument presented by Appellant Phonetele and the United States, appearing as *amicus curiae,* 47 U.S.C. § 221(a), or the Willis-Graham Act, grants the F.C.C. the exclusive right to consolidate telephone companies or allow existing companies to acquire the whole or part of another, free from any potentially or actually conflicting Acts of Congress. 47 U.S.C. § 414 states that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this chapter are in addition to such remedies." From these two statutes the argument is that Congress clearly expressed its intent that A.T. & T. be subject to antitrust remedies, except in the limited situation of Section 221(a); and since Section 221(a) clearly has no application to this lawsuit, Appellees must be subject to potential treble damages under the Sherman Act.

The existence of the saving clause does not alter the well-settled principle that persons such as the Appellant must exhaust their administrative remedies prior to bringing an action in a court of law. *United States Navigation Co.* v. *Cunard S. S. Co., supra,* 284 U.S. at 485-486, 52 S. Ct. at 251, and cases cited therein. And, in the field of antitrust litigation, dismissal of antitrust suit, where an administrative remedy has superseded the judicial one, is the usual course. *Pan American World Airways, Inc.* v. *United States, supra,* 317 U.S. at 313, n. 19; 83 S. Ct. at 486-487, n. 19, and cases cited therein. Thus, the existence of the saving clause

has no effect upon the doctrine of implied immunity. See also *Pan American World Airways, Inc., supra,* 317 U.S. at 321, 83 S. Ct. at 490 (J. BRENNAN, Dissenting).

More fundamentally, this Court rejected the argument presented based upon Section 221(a) five years ago in the case of *International T. & T. Corp.* v. *General T. & E. Corp.*, 518 F. 2d 913 (9th Cir. 1975). That case involved an antitrust action brought by I. T. & T. against G. T. & E., alleging that G.T. & E.'s acquisitions of 33 telephone operating companies had enabled it to effect a growing foreclosure of competition within the telecommunications equipment-manufacturing industry. In dictum the Court stated:

> . . . The availability of a statutory exemption upon application to the FCC greatly reduces the danger of collision between the "two regimes . . ." and even if a statutory exemption is not obtained [under 47 U.S.C. § 221(a)] or is not available a defendant can make a claim of implied immunity which will be tested under the "repugnancy" standards of *Philadelphia National Bank [supra]* and its successors, thus insuring that the policies of the regulatory statute will not be thwarted.

518 F. 2d at 918-919. There are two circumstances in which a court may look beyond the express language of a statute in order to give force to Congressional intent: where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the overall statutory scheme or lead to an absurd result. *International T. & T. Corp.* v. *General T. & E. Corp., supra* at 917-918, and cases cited therein. In this case, if one were to interpret Section 221(a) to mean that that was the only instance in which telephone companies were immune from antitrust litigation, such an interpretation would thwart the purpose of the overall statutory scheme. If the F.C.C. had no power to consider the anticompetitive acts of the common carriers under its jurisdiction, the result might well be different. But, it is

undisputed that the F.C.C.'s powers are very broad and its mandate to protect the public interest includes the power to consider such anticompetitive acts which, in the case of the interconnect industry, it has done. And, as is evident from the decisions of the F.C.C. heretofore cited, the F.C.C. does not and cannot consider itself bound exclusively by principles of competition in protecting the public interest.

I cannot agree with the majority's decision to remand. The majority states:

> We thus recognize that those considerations advanced in favor of implied immunity, while not providing a blanket exemption, do bear on the case in a limited way. The logic of complying with a regulatory mandate is relevant as an antitrust defense, but the same logic has internal limits which do not justify any and all acts ostensibly taken in response to the FCA. There is no absolute antitrust immunity or exemption by virtue of federal or state law in this case, but the defendants below may offer to show that their actions were justified by the constraints of the regulatory schemes in which they operated.

These were the issues squarely before the trial judge and decided by him in an eloquent and brilliant decision. It defies logic to remand issues already heard and decided.

I recognize that this dissent is authored in a time in which it is politically fashionable to criticize regulatory agencies for their very existence and to criticize the telephone companies for their very existence as a monopoly. Nonetheless, we are first and foremost a nation of laws and the principle of *stare decisis* is the single most important key to the cohesiveness of our society. After examining the principles of law in the factual settings of *Gordon* and *NASD*, and after examining the extent to which the F.C.C. has attempted to regulate the interconnection industry, I find it inconceivable to do anything but affirm. Therefore, I respectfully dissent.

FOOTNOTES

1. At oral argument we requested supplemental briefs on the issue of whether the activities of Appellees were immune from antitrust litigation due to state regulation under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943) and its progeny. Upon reconsideration, this case is inappropriate for a consideration of that issue. First of all, it was not raised to either Court below. Secondly, the F.C.C. in its *Telerent* decision effectively preempted the states from regulating the area of the interconnection industry; to the extent that the states regulate at all, at least with respect to the California P.U.C., it is in a manner perfectly consistent with the F.C.C. registration program of 47 C.F.R. §§ 68.100 et. seq. See *Phonetele, Inc.* v. *American Telephone & Telegraph*, 435 F. Supp. at 213, n. 12.

2. For the sake of brevity discussion of the alleged vertical conspiracy and Counts II-VIII of that complaint is omitted here.

Appendix B

A-68

(Filed March 15, 1982)

Order

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 77-3877
77-2936

PHONETELE, INC.,
Plaintiff-Appellant,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INCORPORATED;
BELL TELEPHONE LABORATORIES, INCORPORATED,
Defendants-Appellees.

DASA CORPORATION, ETC.,
Appellant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, *et. al.*,
Appellees.

Before: KENNEDY and FLETCHER, Circuit Judges, and CLAIBORNE,* District Judge.

The opinion is amended as follows. The sentence in the text which begins in the right hand column at page 6269 of the slip opinion carries over to 6270 (beginning "At this stage") is stricken, and the following sentence is inserted in place:

> At this stage of the proceedings, it appears this inquiry will depend largely on whether the facts show the companies did reasonably conclude, given their expertise, that uncontrolled NCSU interconnection would endanger their own equipment or disrupt their own signal transmissions in identifiable ways, and also that the tariff as filed was a reasonable, properly focused mechanism, considering other alternatives then available, to prevent such real harm from occurring.[58]

* Honorable Harry E. Claiborne, Chief Judge, United States District Judge for the District of Nevada, sitting by designation.

Appendix C

A-69

(Filed July 26, 1977)

Memorandum of Decision

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 74-3566-WPG

PHONETELE, INC.,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,

Defendants.

Phonetele, Inc. filed this antitrust suit against American Telephone and Telegraph, Inc. (AT&T), Western Electric Co., Inc. and Bell Telephone Laboratories, Inc., charging violations of the Sherman (15 U.S.C.A. §§ 1, 2 (Supp. 1977)) and Clayton (15 U.S.C. § 14 (1970)) Antitrust Acts. Phonetele alleges that the violations grew out of various tariffs that AT&T filed with the Federal Communications Commission (FCC) and which, the plaintiff contends, had the effect of impeding Phonetele's sales in the telecommunications marketplace.

Phonetele manufactures a device called a "Phonemaster," which is an electronic device designed to be linked to the national telephone network. Once attached to a telephone instrument, the Phonemaster prevents outgoing calls to telephones that are not in pre-selected area codes or exchanges. Thus, it can bar the completion of unauthorized or misdialed long distance calls, which in turn can result in considerable savings to telephone subscribers.

The essence of Phonetele's complaint is that the defendants have conspired to limit sales of the Phonemaster by restricting the manner in which the device can be "interconnected" with the national telephone system. Prior to 1968, tariffs[1] filed by AT&T

with the FCC prohibited the interconnection of customer-provided equipment with the national telephone network. However, this practice was invalidated by the FCC in *Carterfone*, 13 F.C.C. 2d 420, *reconsideration denied* 14 F.C.C. 2d 571 (1968). Following that decision, AT&T filed a tariff[2] that permitted interconnection so long as AT&T hardware was used to form the linkage between the Phonemaster and the telephone network. The tariff also required the customer to pay AT&T an installation charge and a monthly service fee for the interconnecting equipment. This is the tariff that is challenged in this action.

The defendants respond that they are immune from antitrust liability because this aspect of the telecommunications industry is pervasively regulated by the FCC and its counterpart agencies at the state level. They argue that when Congress mandated an extensive federal regulatory system over telecommunications by passing the Communications Act of 1934 (47 U.S.C. §§ 151-609) (the "Communications Act" or the "Act"), it simultaneously effected an implicit repeal of the federal antitrust laws to the extent that they were repugnant to the regulatory program. Accordingly, the defendants have moved for judgment on the pleadings, arguing that this case should be dismissed because the regulatory scheme and the antitrust laws do not permit of mutually harmonious application. This court took the matter under submission, and now grants the motion.

I

Antitrust Immunity

The goals of regulatory laws and antitrust statutes often are in conflict. *See FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). The former usually are predicated on the assumption that unrestrained interaction of competitive forces in a particular industry will disserve the public interest; while the latter are founded upon the premise that such unrestrained interaction will yield the best allocation of economic resources. 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 1, 4-5 (1971). *Pan American World Airways, Inc.* v. *United States*,

371 U.S. 296, 301 (1963). In certain instances, Congress has recognized that antitrust enforcement would clash so severely with the goals of a newly minted regulatory program that an express partial repeal of the antitrust laws has been made a part of the regulatory statute.[3] However, in some instances where Congress has not specifically provided for repeal, the Supreme Court has held that the antitrust and regulatory statutes are so mutually inconsistent that a partial repeal of the antitrust laws should be inferred to the extent necessary to vindicate the regulatory scheme. *E.g., Pan American World Airways, Inc.* v. *United States, supra; United States* v. *Association of Securities Dealers,* 422 U.S. 694 (1975).

The Supreme Court has laid down some guidelines for applying the doctrine of such implied immunity. Thus, implicit repeals are "strongly disfavored," *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350 (1963); should be found only "in cases of plain repugnancy between the antitrust and regulatory provisions," *id.*; "and then only *pro tanto* to the extent of the repugnancy." *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 456 (1945). In short, repeal should be inferred only where necessary to make the regulatory program work. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

II

The Regulatory Program

An analytical starting point for a determination of whether antitrust principles are repugnant to the FCC's regulation of the interconnection of customer-owned devices with the national telephone network ("interconnection"), is a consideration of the nature of the regulatory program established by Congress. The legislative history of the Communications Act is silent on the subject of immunity.[4] However, it indicates that the FCC is to have "comprehensive jurisdiction over the [telecommunications] industry."[5] The FCC is to exercise this jurisdiction over common carriers, like AT&T, which are to make available a rapid, efficient

and adequate national communications system with service pursuant to "just and reasonable" tariffs initiated by the carriers. (§ 201(b)). In addition, the Act proscribes conduct by carriers that constitutes unjust or unreasonable discrimination in providing service (§ 202), and requires them to furnish such service "upon reasonable request therefor." (§ 201(a)).

In order to effect these goals, the Act requires a common carrier to file "schedules" (tariffs) with the FCC, setting forth the manner in which the carrier plans to operate its communications service. (§ 203(a)). No carrier may engage in business unless tariffs have been filed (§ 203(c)), nor may a carrier deviate from the tariffs unless they are properly amended. (§ 203(b)(1)). The FCC may pass on the lawfulness of tariffs by holding hearings to determine whether the tariffs are "just and reasonable" (§§ 204-205) or "in violation of any of the provisions of the [Act]." (§ 205). Hearings are commenced either upon the initiative of the FCC or upon complaints filed by interested parties. (§§ 204, 208). If, after a hearing, the Commission finds that a tariff is unlawful, it may modify it. (§ 203(b)(2)).

The FCC is also obliged to keep itself informed as to "technical developments and improvements" in the telecommunications field, so that "the benefits of new inventions and developments may be made available to the people of the United States." (§ 218). Finally, the FCC is empowered to "make such rules and regulations . . . as may be necessary in the execution of its functions" (§ 154(i)), and "as may be necessary in the public interest to carry out the provisions of [the Act]." (§ 201(b)). This "public interest" compass should guide the Commission's determination of whether a carrier-initiated tariff is "just and reasonable" (§ 201(b)) and whether, pursuant to § 205, it conforms to the general policies set forth in § 151, namely, to make available a rapid and efficient telephone system.

Although competition is a relevant component of the "public interest" it is not determinative.[6] Rather, the FCC is to measure the salutary effect that competition will have upon the quality of

telecommunications service provided to the public. As Justice Frankfurter stated in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 97 (1953):

> "[T]he Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. . . . Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is not enough."

The FCC has expressed its awareness that the antitrust goals of encouraging free competition are not necessarily in harmony with the public interest standard that must govern its regulatory function.[7]

It is within the hereinabove described statutory system that the FCC has regulated interconnections. Prior to 1968, the tariff that AT&T had on file with the FCC flatly prohibited interconnection. Tariff F.C.C. No. 132, (filed April 16 1957), superseded by tariff F.C.C. No. 263, (filed January 2, 1968). In *Carterfone*, 13 F.C.C. 2d 420, *reconsideration denied* 14 F.C.C. 2d 571 (1968), the FCC determined that such tariff was unreasonable and unlawful within the terms of § 201(b), and called upon carriers to submit new tariffs that would permit interconnection but would not "adversely affect the telephone company's operations or the telephone system's utility for others." 13 F.C.C. 2d at 424, 14 F.C.C. 2d at 573. The carriers responded in 1968 by filing new tariffs that permitted interconnection through carrier-supplied connecting arrangements, and in conjunction with carrier testing of customer-supplied equipment. The FCC was uncertain that this method was the minimum protection required to preserve the integrity of the telephone network at the lowest cost, but "exercising an abundance of caution in protecting the telephone network from possible harm allowed the tariffs to become effective[8] without ruling explicitly on their lawfulness." 40 Fed. Reg. 53013, 53014 (1975).

Between 1969 and 1972, the FCC conducted informal proceedings to assist in its evaluation of the public interest factors involved in liberalizing interconnection rules without compromising the efficiency of the national telephone network. The Commission issued technical research contracts to study the effects of interconnection and solicited comments from interested parties. *Id.* On June 14, 1972, the FCC instituted a Proposed Rule-Making aimed at determining the best approach to interconnection. 35 F.C.C. 2d 539 (1972). These proceedings remained active during 1973 and 1974 when comments were solicited about various proposals for systematic regulation of interconnection. 40 F.C.C. 2d 315 (1973). On November 14, 1975, after giving full and complete consideration to many suggested regulatory programs, the FCC proposed a "Registration Program" for customer-owned equipment. 40 Fed. Reg. 53013 (1975) (codified in 47 C.F.R. § 68 (1976)). Basically the program allows users to interconnect their equipment if it is attached through protective circuitry registered with the FCC or if the equipment itself is so registered. The FCC will not register a device that it concludes will present potential harm to the overall quality or safety of the national telephone network. Non-registered equipment may be attached with telephone company interface devices. The Commission's program was recently upheld by the Fourth Circuit. *North Carolina Utilities Commission* v. *FCC*, No. 76-1002 (4th Cir. March 22, 1977).

III

Application of Antitrust Immunity Theory

It appears evident from the foregoing that if the federal antitrust laws are applied to the interconnection of customer-owned telecommunications devices, the sophisticated regulatory program of the FCC will not work. These two statutory concepts are sufficiently mutually repugnant to compel the inference that Congress intended to repeal the antitrust laws otherwise applicable to the area of interconnection.[9]

This conclusion is consistent with prior Supreme Court decisions about implied immunity, because four factors that the Court found relevant in those cases are present here.[10] First, the acts charged in this civil suit as antitrust violations involve the "precise ingredients" of the regulatory authority vested in the FCC. *See Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 305 (1963). As the earlier discussion in this memorandum shows, Sections 201-218 of the Communications Act mandate that the Commission regularly monitor tariffs and terminate unlawful ones. The promulgation and implementation of tariffs is the principal conduct about which Phonetele complains.[11] Moreover, the previously described Registration Program (47 C.F.R. § 68 (1976)), shows that the Commission has maintained tight control over interconnection.[12]

Second, like the regulatory agencies involved in *Pan American*, 371 U.S. at 311-12, and *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 734 (1975), the FCC has authority to grant the relief sought in the complaint. Since the Commission can issue cease and desist orders (§ 205(a)) and modify carrier-initiated tariffs (§ 203(b)(2)), it can provide the injunctive relief that Phonetele desires. Pursuant to Sections 206-209 of the Act, the FCC can also award damages to Phonetele. *See Western States Telephone Co.* v. *American Telephone and Telegraph Co.*, 19 F.C.C. 2d 1068 (1969). *See also Booth* v. *American Telephone and Telegraph Co.*, 253 F.2d 57, 58 (7th Cir. 1958). And assuming, *arguendo*, that Phonetele has standing to seek a rebate for one of its customers, it may apply for such relief from the FCC. (§ 204(a)).

Third, competition is a component of the public interest standard that guides the Commission's regulation of interconnection.[13] The Court's decisions in *Pan American, Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers*, 422 U.S. 694 (1975) indicate that implied immunity is logical when, in formulating its regulatory policy, the agency includes a consideration of the beneficial purposes of preserving competition.

Fourth, the FCC has considerable expertise in the field of interconnection, to which courts have deferred, *e.g.*, *Carter* v. *American Telephone and Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967). The Supreme Court has suggested that agency expertise supports a finding of implied immunity. *Gordon*, 422 U.S. at 689-90. In light of the complex electrical engineering questions presented by interconnection, inferred antitrust immunity, and thus deference to the FCC, are reasonable. This will prevent the application of conflicting statutory standards to the defendants and will thereby protect the integrity of the regulatory program that Congress established in the Communications Act. To hold otherwise would be to sanction the collision of the policies of the Antitrust and Communications Acts, a result that plainly would disserve the goals of both.

In reaching this conclusion, it is heartening to note that my brother Judge Lydick rendered a similar decision involving another device that is interconnected to the national telephone network. *DASA Corporation* v. *General Telephone Co. of California*, No. CV 73-2511-LTL (C.D. Cal. May 10, 1977).

For the reasons hereinabove set forth the defendants' motion is granted.

DATED: July 25, 1977.

/s/ WILLIAM P. GRAY

William P. Gray
United States District Court

FOOTNOTES

1. As part of the regulatory regime established by the Communications Act of 1934, 47 U.S.C. §§ 151-609, AT&T is required to submit "schedules" to the FCC showing all charges between points on its system. (§203(a)). These schedules are called "tariffs." The regulatory framework established by the Communications Act is considered in Part II, *infra*.

2. Revised tariff F.C.C. No. 263, filed October 22, 1968.

3. *E.g.*, 47 U.S.C. § 221(a) (1970) (providing that consolidations of formerly independent telephone companies, once approved by the FCC, are not subject to the antitrust laws.) Phonetele argues that this express grant of immunity in the very statute upon which AT&T relies for its implied immunity claim bespeaks a congressional intent to limit antitrust immunity in the tele-communications field to § 221(a) situations. This argument is unpersuasive. *See United States* v. *NASD*, 422 U.S. 694, 720 (1975) (where immunity was inferred under § 22(f) despite the inapplicability of the express immunity granted by § 22(d) of the Investment Company Act of 1940, (15 U.S.C. § 80a-22(d), (f) (1970)); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 305-310, 320 (1963) (implied immunity applicable to transactions that could not be immunized under express immunity provision of § 414 of the Federal Aviation Act (40 U.S.C. § 1384 (1970)); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, No. 74-1282, slip op. at 1200 (9th Cir. June 9, 1977) ("despite a grant of express immunity that does not cover the conduct charged, antitrust immunity may still be implied.") *See also AT&T* v. *General T. & E. Corp.*, 518 F.2d 913, 919 (9th Cir. 1975).

4. *See United States* v. *AT&T*, No. 74-1698, slip op. at 6-7 (D.D.C. November 24, 1976) (order denying motion to dismiss); Note, *AT&T and the Antitrust Laws*, 85 Yale L.J. 254, 269-70 n. 76 (1975).

5. S. Rep. No. 781, 73d Cong. 2d Sess. at 3 (1934).

6. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 (1953), *Hawaiian Telephone Co.* v. *FCC*, 498 F. 2d 771, 776 (D.C. Cir. 1974). *See Panel, the Role of Competition in Transportation and Communications*, 39 Antitrust L.J. 465, 476-79 (1970) (remarks of FCC Commissioner Kenneth Cox).

7. Memorandum of FCC as *Amicus Curiae* at 12, *United States* v. *AT&T*, Civil No. 74-1698 (D.D.C. filed November 20, 1974) (footnote omitted).

8. *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C. 2d 605 (1968), *reconsideration denied*, 18 F.C.C. 2d 871 (1969).

9. Phonetele's argument that defendants Western Electric and Bell Laboratories are not companies subject to the regulation of the FCC, and therefore should not be relieved under a theory of implied immunity, is not persuasive. These two defendants are accused of conspiring with AT&T within the highly regulated telecommunications sphere, and therefore are not charged with any acts that can escape FCC regulation.

Cf. Gordon v. *NYSE*, 422 U.S. 659 (1975), where the Court concluded that pervasive SEC regulation of commission rates charged by the New York and American Stock Exchanges warranted implied antitrust immunity for the regulated Exchanges *and* for two of their member firms who were also defendants. The SEC supervision that the Court found determinative regulated the Exchanges and not their member firms.

Moreover, the FCC has significant regulatory power over the vertical relationship of regulated firms. *See* 47 U.S.C. § 215 (1970), which gives the FCC the authority to inquire into the transactions of regulated common carriers with non-regulated entities that are likely to affect adversely the carrier's ability to render adequate service to the public at reasonable cost.

10. For a comprehensive consideration of these factors, *see* Note, *AT&T and the Antitrust Laws*, 85 Yale L.J. 254 (1975).

11. The recently decided case of *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, No. 74-1282 (9th Cir. June 9, 1977) is not to the contrary. There the Interstate Commerce Commission (ICC), applying a "public interest" standard (49 U.S.C. § 5(2)), approved Greyhound's acquisition of four bus companies whose routes encircled those of Mt. Hood Stages. However, the ICC had predicated its approval of the acquisitions upon Greyhound's pledge to continue to book its through-passengers on Mt. Hood Stages' lines whenever that would provide the most direct route. When Greyhound reneged on this promise, Mt. Hood Stages instituted an antitrust action and secured a judgment on a jury verdict. On appeal Greyhound pursued unsuccessfully a claim of implied antitrust immunity.

The court reasoned that the ICC had not authorized Greyhound's challenged actions when it approved the acquisitions, and in fact, was assured that such conduct would not occur. Thus, the antitrust case did not overlap the "precise ingredients" of any regulatory proceedings. In the present action, AT&T is not accused of similar attempts to subvert the FCC's determined effort to supervise interconnection. Instead, AT&T is charged with misconduct in the issuance of tariffs, an area at the center of the Commission's regulatory jurisdiction. Accordingly, the application of the antitrust laws here would intrude into the domain of the FCC, a result not required by *Mt. Hood Stages*.

12. Phonetele's contention that some of the defendants' alleged misconduct is within the exclusive jurisdiction of state regulatory agencies, and thus escapes the FCC's supervisory authority, is not persuasive. State supervision over significant issues that relate to the interconnection of customer-provided equipment has been preempted by FCC regulation. *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied* U.S. , 97 S.Ct. 651, 50 L. Ed. 2d 631 (1976). Thus, it is extremely doubtful that any substantial misconduct in this field will elude the regulatory net cast by the FCC.

13. See n. 6, *supra*.

Appendix D

A-79

(Filed March 31, 1982)

ORDER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 77-3877
77-2936

PHONETELE, INC.,
Plaintiff-Appellant,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,
Defendants-Appellees.

DASA CORPORATION, ETC.,
Plaintiff-Appellant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, *et. al.*,
Defendants-Appellees.

Before: KENNEDY and FLETCHER, Circuit Judges, and CLAIBORNE,* District Judge.

Judges Kennedy and Fletcher have voted to deny the petitions for rehearing in the above cases, and Judge Claiborne votes to grant the petitions for rehearing. Judges Kennedy and Fletcher have voted to reject the suggestions for a rehearing en banc, and judge Claiborne has recommended granting the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc hearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

* Honorable Harry E. Claiborne, Chief Judge, United States District Judge for the District of Nevada, sitting by designation.

Appendix E

Statutory Provisions Involved

Sherman Act

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 and 2, provide in pertinent part:

> § 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .
>
> § 2. *Monopolizing trade a misdemeanor; penalty*
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

Clayton Act

Section 3 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. § 14, provides in pertinent part:

> § 14. *Sale, etc., on agreement not to use goods of competitor*
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee

or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Communications Act of 1934

Title I, Sections 1, 2 and 3 of the Communications Act of 1934, 48 Stat. 1064, as amended, as codified in 47 U.S.C. §§ 151, 152 and 153, provides in pertinent part:

§ 151. *Purposes of chapter; Federal Communications Commission created*

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 152. *Application of chapter*

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio,

which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; . . .

§ 153. *Definitions*

For the purposes of this chapter, unless the context otherwise requires —

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

. . .

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of

this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

. . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Title II, Sections 201, 202, 203, 204, 205, 213, 214 and 215 of the Communications Act of 1934, 48 Stat. 1064, as amended, as codified in 47 U.S.C. §§ 201-205, 213-215, provides in pertinent part:

§ 201. *Service and charges*

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .

§ 202. *Discriminations and preferences*

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

. . .

§ 203. *Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations*

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the

Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

. . .

§ 204. *Hearings on new charges; suspension pending hearing; refunds*

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and

decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

§ 205. *Commission authorized to prescribe just and reasonable charges; penalties for violations*

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter,

the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

. . .

§ 213. *Valuation of property of carrier*

(a) The Commission may from time to time, as may be necessary for the proper administration of this chapter, and after opportunity for hearing, make a valuation of all or of any part of the property owned or used by any carrier subject to this chapter, as of such date as the Commission may fix.

(b) The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier, which inventory shall show the units of said property classified in such detail, and in such manner, as the Commission shall direct, and shall show the estimated cost of reproduction new of said units, and their reproduction cost new less depreciation, as of such date as the Commission may direct; and such carrier shall file such inventory within such reasonable time as the Commission by order shall require.

(c) The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. If the carrier owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with such original cost. The report made by a carrier under this subsection shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

(d) Nothing shall be included in the original cost reported for the property of any carrier under subsection (c) of this section on account of any easement, license, or franchise granted by the United States or by any State or political subdivision thereof, beyond the reasonable necessary expense lawfully incurred in obtaining such easement, license, or franchise from the public authority aforesaid, which expense shall be reported separately from all other costs in such detail as the Commission may require; and nothing shall be included in any valuation of the property of any carrier made by the Commission on

account of any such easement, license, or franchise, beyond such reasonable necessary expense lawfully incurred as aforesaid.

(e) The Commission shall keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of common carriers, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of carrier properties.

(f) For the purpose of enabling the Commission to make a valuation of any of the property of any such carrier, or to find the original cost of such property, or to find any other facts concerning the same which are required for use by the Commission, it shall be the duty of each such carrier to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and to cooperate with and aid the Commission in the work of making any such valuation or finding in such manner and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

. . .

(h) Nothing in this section shall impair or diminish the powers of any State commission.

§ 214. *Extension of lines; certificate of public convenience and necessity; discontinuance of service.*

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: . . . *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section

shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this

section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

§ 215. *Services, equipment, etc.; examination of transactions by Commission*

(a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this chapter, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or

in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transactions to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

(b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

(c) The Commission shall examine all contracts of common carriers subject to this chapter which prevent the

other party thereto from dealing with another common carrier subject to this chapter, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

Appendix F

A-96

(Filed Dec. 5. 1974)

COMPLAINT FOR TREBLE DAMAGES AND EQUITABLE RELIEF FROM DENIAL OF ACCESS TO MARKETPLACE FOR CUSTOMER TERMINAL EQUIPMENT BY ANTI—TRUST ABUSE OF COMMUNICATION MONOPOLY

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(213) 278-8011

Attorneys for Plaintiff

PHONETELE, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO.
CV 74 3566 FW

PHONETELE, INC.,

Plaintiff

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,

Defendants.

Claims For Relief Are Based On:

A. Restraint of Trade;
B. Monopolization, and
C. Tying Arrangements.

Plaintiff, as and for its claims for relief against defendants, alleges:

I

Jurisdiction and Venue

1. This complaint is filed and this Court has jurisdiction of this action under Section 4 of the Sherman Act (15 U.S.C. §4) and Sections 4, 15 and 16 of the Clayton Act (15 U.S.C. §§15, 25, 26), to recover damages and secure injunctive relief for defendants' violations of Section 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and Section 3 of the Clayton Act (15 U.S.C. §14).

2. The unlawful acts alleged herein, including the combinations and conspiracies to restrain trade, the monopolization of interstate trade and commerce, the combinations and conspiracies to monoploize, and the effecting of unlawful tying arrangements, have been conceived, carried out and made effective within the Central District of California. Many of the unlawful acts done pursuant thereto have been performed within the Central District of California. The interstate trade and commerce described in this complaint are carried on in part within this district. Each of the defendants transacts business, may be found, or has or has had agents within this district.

II

Description of Phonetele

3. Phonetele (sometimes "the Company") is a California corporation with annual sales approaching $1,000,000. All of these sales have been unwillingly confined to the State of California, as will more fully appear herein, with the exception of installations for the New York Times and for the Lincoln Telephone Company, an independent telephone company located in Nebraska.

4. The Company has been engaged in extensive research, electronic design, invention, and the manufacturing of state of the art equipment in the telecommunications field. As a result of these efforts, Phonetele has developed unique skill in the solid state electronic engineering of what is generally described as telephone restriction equipment.

5. The restriction equipment invented by Phonetele has been sold and installed in Los Angeles County since the latter months of 1970. The Company has been principally engaged in the business of developing and manufacturing such equipment since that time. For purposes of this complaint the initial product and its later developments and engineering generations will be referred to by its trademark, the "Phonemaster".

6. As a one product company manufacturing and selling privately owned telecommunications equipment, Phonetele most purely embodies the multitudinous independent manufacturers nationally attempting to penetrate this market. Phonetele is one of the oldest independent manufacturers of privately owned telecommunications equipment to the end user, and has actually been designing, selling, and installing the Phonemaster for approximately five years.

III

IDENTITY OF THE PRODUCT

7. The Phonemaster is an advanced solid state, special purpose computer. It is designed specifically to interface with the national telephone network. A telephone subscriber ("customer") who purchases the equipment has it connected on his premises, at his terminal ("customer provided terminal equipment"). The Phonemaster owner is then able to restrict outgoing telephone calls to selected area codes or exchange prefixes and/or to certain lines. As a result, the owner is able to control his telephone service calling areas and lines and the amount of telephone service charges he incurs. The Phonemaster serves a subscriber need which has not been met by the defendants.

8. The equipment works by monitoring outgoing dial signals, translating and comparing them to a memory. The calls are then allowed or disallowed based upon a predetermined memory program in the Phonemaster programmed to the owner's specifications. The equipment thereby terminates those calls which have

been improperly placed. A symphonic tone indicates to the calling party that he has dialed an unauthorized area or on an unauthorized line.

9. The Phonemaster operates on the owner's premises. The symphonic tone is one between the owner's switchboard and his individual telephones. Signals are not sent to the central telephone office; by its monitoring concept and design, the Phonemaster does not operate by transmitting signals out over the telephone network.

10. Each individual dialing an owner's telephone is compelled by the Phonemaster to utilize the owner's telephone service in the most economic and efficient manner, both for the owner, and for the telephone network. Benefits of the Phonemaster include preventing unauthorized calls, and the correct use of available lines at any given Phonemaster location.

11. Many large consumers of telephone service, e.g. government entities, banks, insurance companies, or industrial concerns, purchase special kinds of telephone service or lines. These lines include various types of WATS, foreign exchange and tie-lines. Once such service is installed, there is an immediate and inherent problem. Employees may fail to use the correct lines in placing their calls. Therefore, charges appear on the subscriber's telephone bills that would not have been incurred had the proper lines been used. Without dialing control, as provided by the Phonemaster, the subscriber's desired economies for his telephone service are frequently not realized in practical operation.

12. The Phonemaster enforces the proper use of available lines, as well as preventing unauthorized calls, enabling subscribers to effect the use and economies intended for their telephone service. Moreover, the equipment can be programmed to enable designated personnel to have wide calling access from their phones, while others have a limited calling access.

13. Although the Phonemaster sells for $3,000 to $50,000, or more, per installation, a facility which has purchased a $50,000 Phonemaster, for example, achieved a savings of approximately $30,000 per month on the cost of their telephone service.

IV

THE DEFENDANTS

14. American Telephone and Telegraph Company ("AT&T"), Western Electic Company, Incorporated ("Western Electric"), and Bell Telephone Laboratories, Incorporated ("Bell Laboratories") comprise the "Bell System" and are all corporations organized under the laws of the State of New York, with their principal offices in New York City, New York.

15. AT&T is the parent company of the Bell System and owns total or controlling interest in all of its 21 principal operating telephone companies, and has large minority interests in two affiliated operating telephone companies (all 23 are "Operating Companies"). It has a royalty agreement with each of its telephone operating companies. AT&T and the Operating Companies provide approximately 80% of the nation's telephone lines and enjoy this position as a regulated monopoly. AT&T is believed to have a complete monopoly over the approximately 1,700 independent telephone companies by virtue of the fact that their telephone lines are interconnected, out of necessity, to the interstate lines maintained exclusively by AT&T.

16. Western Electric is wholly owned by AT&T. Western Electric has "Supply Contracts" with each of the Operating Companies as well as with AT&T. It manufactures communications apparatus and equipment, including customer terminal equipment.

17. Bell Laboratories is jointly owned by AT&T and Western Electric, each owning one half of its outstanding shares of stock. Bell Laboratories conducts, for the account of Western Electric, development and design work relating to Bell System products.

This includes the development of customer terminal equipment to be manufactured by Western Electric, and in turn supplied to AT&T and the Operating Companies.

18. In 1973 AT&T's consolidated operating revenues exceeded $23,000,000,000, and Western Electric's operating revenues exceeded $7,000,000,000.

V

CO-CONSPIRATORS

19. Plaintiff is informed and believes and thereon alleges that various entities and persons not named as defendants, but herein named as co-conspirators, participated in the conspiracies alleged herein and have done acts and made statements in furtherance thereof. These entities and persons include various Bell System Operating Companies, their officers, directors and employees, and others not presently named.

VI

NATURE OF THE TRADE AND COMMERCE IN CUSTOMER PROVIDED TERMINAL EQUIPMENT

20. AT&T is required by the Federal Communications Commission ("FCC") to file official tariffs with respect to its interstate business, and the Operating Companies are required to file tariffs by state commissions or municipalities, with respect to their intrastate business.

21. The tariffs of AT&T and the Operating Companies are regulations promulgated, without notice, by AT&T and the Operating Companies themselves. These tariffs govern the practices and charges to be followed, and are recognized with force of law. The tariffs, in turn, serve as a report to the respective commissions on the practices and charges of the telephone companies. In absence of objection by those who were able to acquire knowledge

that a tariff had been filed, the tariffs normally become automatically effective within 30 days of filing with the FCC or the respective state agency. Plaintiff is informed and believes, and thereon alleges, that in all cases the tariffs go automatically effective without the benefit of the considered judgment of the responsible commissions provided by formal hearings. The Operating Companies file conforming tariffs to those filed by AT&T. Independent telephone companies likewise file or follow conforming tariffs.

22. Prior to 1969, AT&T and the Operating Companies had tariffs on file with the FCC which blanketly prohibited telephone subscribers from installing (interconnecting) customer provided terminal equipment with the national telephone network. There was an absolute prohibition against customer provided terminal equipment.

23. In 1968, the FCC issued the landmark decision, *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, holding that the above-described tariffs of AT&T be stricken as invalid, unlawful and unreasonably discriminatory. AT&T argued the *Carterfone* case on behalf of itself and the Operating Companies.

24. Following this FCC decision, AT&T filed revised tariffs (FCC 263), effective January 1, 1970, and caused the Operating Companies to file conforming local tariffs with respect to their intrastate business. These tariffs, as is usual, became effective without formal hearing, and their legality has never been ruled upon. The new tariffs permit certain types of customer provided terminal equipment to be connected to the telephone network, but only by means of a "connecting arrangement", and upon fixed charges.

25. The tariff provisions governing customer terminal equipment specified in FCC 263 or conforming tariffs do not, however, as written, embrace the Phonemaster. Nevertheless, only in California, and only if the California purchaser acquiesces to the connecting arrangement and its attendant charges, is he then allowed to use the Phonemaster. These charges in California

have been held in abeyance by Phonetele only by means of a lengthy and expensive legal battle which culminated in the Supreme Court of the State of California. *Phonetele* v. *PUC* 11C 3d 125, Cal Rptr, P 2d (1974).

26. The connecting arrangement is specified hardware which is supplied by AT&T or the respective Operating Companies. The charge for the installation, and the monthly "service" charge provided by the tariffs for the utilization of connecting arrangements, provide considerable revenue to AT&T and the Operating Companies.

27. Since the decision in *Carterfone*, a new and substantial industry for the development, manufacture and sale of telephone equipment was potentially opened to companies which were not owned or controlled by defendants. Phonetele is informed and believes, and thereon alleges, that the capital value of telephone terminal equipment in the field is in excess of $11,250,000,000 and the Phonemaster enjoys a small yet firmly entrenched share of this market because of its innovations, design, reliability, and length of time in the marketplace. The Phonemaster serves a need that was, and is not, being met by defendants.

VII

Economic Interests

28. The sale of Phonemaster conflicts with the economic interests of AT&T and the Operating Companies in three respects. First, the Phonemaster is in direct competition with the older relay technology equipment provided by the Operating Companies, in some cases, to perform the somewhat similar, but rudimentary, restriction functions. Whenever this equipment is replaced by the Phonemaster, AT&T and the Operating Companies lose substantial revenues, and sizable capital investments.

29. Second, the Phonemaster equipment results in a substantial reduction of AT&T and the Operating Companies' revenues,

because it restricts unauthorized and incorrect telephone usage which could be made from an owner's premises and provides for efficient use of telephone service.

30. Third, the requirement that Phonemaster purchasers use a connecting arrangement, with its attendant charges, creates delays in installation and operational difficulties; therefore, a state of uncertainty results. This result is in the economic interests of the defendants, for it is believed the effect has been to forestall competition for sufficient time to allow the defendants to develop both a competitive product to the Phonemaster and a marketing counter-offensive strategy.

VIII

CHARGING ALLEGATIONS

31. Defendants have unlawfully:

A. Combined, conspired, and agreed to restrain trade and commerce in the marketing, sale and distribution of the Phonemaster;

B. Monopolized, and combined and conspired to monopolize, the terminal equipment market; and

C. Effected tying arrangements.

Such conduct and acts are in violation of Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act. The combination, conspiracy and agreements consist of continued agreements, concert of action, and ownership and directorship control among defendants and their co-conspirators. The violations of the above statutory Sections have been by means and methods known to the defendants, but including the following, among others.

32. In early 1970, following their filing of tariff FCC 263, AT&T and the Operating Companies caused to be filed with state and local agencies, respectively, conforming tariffs which required that customer provided terminal equipment be interconnected only by means of a connecting arrangement.

33. In furtherance of this combination and conspiracy, and by virtue of a total monopoly over the national telephone lines, AT&T and the Operating Companies actively enforce the tariff for "connecting arrangements" arbitrarily to require "protective connecting arrangements".

34. AT&T and the Operating Companies have filed, enforced, and interpreted their tariffs so far as they concern the Phonemaster with a full knowledge that under the tarriffs, the connection of the Phonemaster to the telephone network is not covered and, even if covered, the connection of the Phonemaster can be effected within the specified terms of the tariffs themselves by means of a simple terminal block. The terminal block is a device which is simple in technology and inexpensive in cost to the telephone subscriber.

35. In California, the responsible Operating Company has required a protective connecting arrangement, by which it allows Phonetele's customers to connect the Phonemaster within the State of California to the telephone network. This protective connecting arrangement, called the ZZAGM, is needlessly expensive. Nevertheless, in the State of California, Phonetele has been allowed to sell and connect its equipment through use of the ZZAGM, with its attendant installation and monthly service charges to the subscriber.

36. In December 1970, defendants represented to Phonetele the ZZAGM was the national or Bell System connecting arrangement for the Phonemaster. Nevertheless, AT&T refused to employ the ZZAGM on an interim basis outside of California until the alleged Bell System connecting arrangement was developed, more than three years after the December, 1970 false representation to Phonetele.

37. Other than the State of California, and other than one installation at the New York Times in New York City, installed in March, 1974, and one installation at Lincoln Telephone Company for use in their own central office facility, the defendants and the Operating Companies have exercised their monopoly power

and in furtherance of their combination and conspiracy had not made available a connecting arrangement for installation of the Phonemaster. Consequently, Phonetele had not been allowed to connect the Phonemaster to the telephone network on a national basis until March 1974.

38. This non-availability had been despite Phonetele's continued insistence and good faith negotiations with defendants and the various Operating Companies, to allow the Phonemaster connection. Phonetele believes since the New York Times installation in March, 1974, the Phonemaster can now be installed outside of the State of California.

39. The connecting arrangement finally made available at the New York Times is called the CTH. The monthly service charges to the subscriber for this connecting arrangement, however, are approximately 3½ times the charges for the ZZAGM in California. Both connecting arrangements purportedly serve identical functions of alleged "network protection".

40. In view of AT&T's and the Operating Companies' unlawful enforcement of their tariffs to require protective connecting arrangements for installation of the Phonemaster, Phonetele submitted a written request for a Declaratory Ruling from the FCC that FCC 263 did not cover the Phonemaster. On August 30, 1974 Walter Hinchman, Chief of the Common Carrier Bureau of the FCC, rendered a favorable Declaratory Ruling for Phonetele, attached as Exhibit A and incorporated herein by reference.

41. AT&T and the Operating Companies cause terminal equipment to be leased to telephone subscribers. The leases contractually make the subscribers subject to a basic termination charge if the subscriber makes a decision to replace defendants' leased equipment with independently manufactured customer provided terminal equipment. This practice hampers the subscribers' freedom of choice and denies independent manufacturers, like Phonetele, free and fairly competitive access to the marketplace for telephone terminal equipment.

42. Defendants are engaged in a course of commerce as a regulated monopoly which leases telephone lines to the public telephone subscriber within the United States. From this monopoly and position, defendants have unlawfully lessened competition and created a monopoly in the market for telephone terminal equipment because AT&T and the Operating Companies are leasing their telelines on the condition, with the agreement, and with an understanding that the telephone subscsriber shall not purchase, use or deal in the goods or equipment of independent telephone equipment manufacturers as Phonetele without great uncertainty and peril, due to connecting arrangements and the attendant costs, as interpreted, and enforced by AT&T and the Operating Companies.

IX

EFFECTS OF VIOLATIONS

43. The effects of defendants' violations has been without limitation, as intended by defendants, to:

In all Markets

(a) Place an unfair burden upon Phonetele to compete against equipment sold by defendants, which they install without a connecting arrangement, and has forced Phonetele and its customers to encounter unnecessary design and installation problems and costs caused by the cumbersome protective connecting arrangement itself, which would not be encountered by the Company if the Phonemaster were connected to the telephone network in a reliable, economical manner;

(b) Deprive Phonetele of the ability to obtain critical financing because of uncertainties necessarily thrust upon Phonetele's marketing efforts creating inability to construct valid marketing projections, and to conduct a viable national sales and marketing program;

(c) Require installation of the Phonemaster only by means of a protective connection arrangement;

(d) Jeopardize Phonetele's lead time and leadership gained by early development, marketing and installation of its telephone restriction equipment so that defendants

and independent competitors or potential competitors can now more effectively compete with Phonetele in the telephone restriction equipment market.

Outside California

(e) Deny Phonetele means or ability to market or install the Phonemaster to the telephone network and thus deny Phonetele access to the national market for customer provided terminal restriction equipment, in restraint of trade and commerce;

(f) Eliminate and preclude competition and potential competition in telephone restriction equipment and to render impossible economical and desired usage of telephone service by means of the Phonemaster;

(g) Deprive telephone subscribers of equipment which is privately beneficial;

In California

(h) Impede and prevent sales of the Phonemaster because of requirement of the ZZAGM which was unreliable, unnecessarily and unreasonably expensive;

(i) Force Phonetele to absorb the price of the ZZAGM in the pricing of its equipment making it more expensive to the customer with no increase in revenues to Phonetele;

(j) Cause Phonetele to incur unnecessary delays, costs and servicing problems in the installation of the Phonemaster and cause Phonetele to lose credibility in the marketplace by such delays;

In New York

(k) Require the New York Times to pay artificial and unreasonably high and unnecessary installation and ongoing "service" charges for the protective connecting arrangement (CTH) which AT&T and the respective Operating Company required the New York Times to utilize in conjunction with the installation of the Phonemaster. The total price of the CTH and the Phonemaster to New York subscribers hampers Phonetele's marketing efforts.

X

DAMAGES

44. As a direct and proximate result of defendants' violations and the resulting effects, plaintiff has been damaged in its business and property in an amount, proof of which will be offered at trial, but believed to be in excess of $30,000,000, then trebled, as provided by law. As a direct and proximate result of the conduct of defendants, which is continuing, plaintiff has suffered, and will suffer, further irreparable injury and damages for which there is no adequate remedy at law.

XI

RELIEF SOUGHT

WHEREFORE, plaintiff, PHONETELE, INC., prays that:

A. Defendants, and each of them, be adjudged to have combined and conspired to restrain and to monopolize interstate trade and commerce, to have monopolized such trade and commerce, and to have effected tying arrangements in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act;

B. Plaintiff be awarded judgment against defendants, and each of them, for three-fold the damages it has sustained by reason of these violations, the amount of which is not known but will be proved at trial, and upon information and belief will exceed $30,000,000, then trebled by the Court.

C. Defendant, AT&T, be temporarily and permanently restrained and enjoined from filing, or causing to be filed by its Operating Companies, any tariff which provides for connection of the Phonemaster to the telephone network by means of a connecting arrangement other than by a simple terminal block, at a nominal one-time installation charge.

D. Defendant AT&T and its respective Operating Company in New York be ordered to rebate or otherwise properly credit to the New York Times of New York, New York, substantial service charges which have been

incurred by unlawful use of the CTH connecting arrangement in conjunction with the Phonemaster installation at the New York Times.

E. Defendant AT&T be temporarily and permanently restrained and enjoined, or causing to be enforced by its Operating Companies, any provisions regarding basic termination charges when defendants' equipment is replaced by the Phonemaster.

F. Defendant AT&T be ordered to fulfill its regulated carrier responsibility by causing the Phonemaster to be tariffed nationwide by the Operating Companies and that AT&T be ordered to cause the Operating Companies to offer the Phonemaster for sale or lease, particularly and without limitation, to offer for sale or lease at those locations where defendants' equipment is now being used.

G. Defendant be permanently restrained and enjoined from treating any damages and costs of this litigation as an operating expenses chargeable to its subscribers, but rather any damages and costs should be borne by their shareholders.

H. Plaintiff be awarded the cost of this suit, including reasonable attorneys' fees; and

I. Plaintiff be awarded such other and further relief as this Court deems just and proper.

/s/ RICK M. STEIN
Rick M. Stein

/s/ PAUL S. SIGELMAN
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INDEX TO COMPLAINT

		PAGE
I.	JURISDICTION AND VENUE	1
II.	DESCRIPTION OF PHONETELE	2
III.	IDENTITY OF THE PRODUCT	3
IV.	THE DEFENDANTS	4
V.	CO-CONSPIRATORS	5
VI.	NATURE OF THE TRADE AND COMMERCE IN CUSTOMER PROVIDED TERMINAL EQUIPMENT	6
VII.	ECONOMIC INTERESTS	8
VIII.	CHARGING ALLEGATIONS	9
IX.	EFFECTS OF VIOLATIONS	12
X.	DAMAGES	14
XI.	RELIEF SOUGHT	14

[Letterhead of Federal Communications Commission]

August 30, 1974

Rick M. Stein, Esquire
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9595 Wilshire Boulevard
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Dear Mr. Stein:

This refers to your letter of August 22, 1973, in which you request a ruling with respect to the "Phonemaster" devices similar to that given to Telephonic Equipment Corporation in a letter of July 11, 1973 from the Chief, Domestic Rates Division relating to the "telepatcher" device. Specifically, you ask for a ruling on the question of whether Tariff FCC No. 263 of AT&T requires a "protective connecting arrangement" to be used with the Phonemaster devices.

It is our understanding that the Phonemaster is a solid state mini computer which monitors signals on the telephone line and transmits a tone "restrict" signal to the calling station if an unauthorized number is called and opens the circuit thereby blocking any such unauthorized call.

AT&T's Tariff FCC No. 263, which governs interstate and foreign Long Distance Telecommunications Service, provides at Section 2.6 that for direct, electrical connection of certain types of customer-provided equipment to telephone company facilities, such connection must be made through a connecting arrangement provided by the telephone company. We interpret your letter as questioning whether or not the use of a simple terminal block to connect customer-provided Phonemasters would be in accordance with AT&T's Tariff FCC No. 263.

The word "protective" does not appear in AT&T's tariff regulations applicable to the Phonemaster, nor does any word of similar import appear therein. Therefore, insofar as AT&T's interstate

Tariff FCC No. 263 is concerned, the "connecting arrangement" required therein need not be "protective." The provision of a simple terminal block by the telephone company would, in our view, constitute a "connecting arrangement" within the meaning of AT&T's tariff for interstate and foreign toll services.

Moreover, insofar as AT&T's interstate Tariff FCC No. 263 is concerned, it is not clear to us that a connecting arrangement of any type is required for the Phonemaster. The types of customer-provided equipment covered in Section 2.6 of Tariff FCC No. 263 include: (a) Data Transmitting and/or Receiving Terminal Equipment; (b) Voice Transmitting and/or Receiving Terminal Equipment; (c) Channel Derivation devices; (d) headsets; and (e) non-powered conferencing devices. As a device which merely restricts the signals generated by conventional telephone company equipment, and thereby controls the locations to which toll calls may be placed, it is not clear that the Phonemaster can reasonably be construed as being in any of these categories. AT&T appears to contend that the Phonemaster is a "voice transmitting and/or receiving terminal equipment" because it receives "network control signals which are generated to effectuate voice connections" and it transfers "voice frequency signals" to stations through telephone company equipment. However, we find no reference to "voice frequency signals" in the tariff, nor do we believe the Phonemaster device can realistically be said to either "transmit" or "receive" network control signals as those terms are normally used. Accordingly, we do not believe that Phonemaster is a device that can reasonably be construed as being within any one of the aforementioned categories that require a "connecting arrangement." In arriving at this construction of the tariff, we recognize the rule that ambiguous tariffs shall be construed favorably to the user.

In summary, you are advised, pursuant to Section 0.91(e) of the Commission's Rules, that it is the view of the Common Carrier Bureau that AT&T's Tariff FCC No. 263 does not require a connecting arrangement for the Phonemaster and that, even if

one is required, under the tariff, a simple terminal block provided by the telephone company would, in our opinion, constitute such an arrangement within the meaning of the tariff.

Sincerely,

/s/ WALTER HINCHMAN

Walter Hinchman
Chief, Common Carrier Bureau

cc: American Telephone and Telegraph Company
Robert L. Feiner

Office - Supreme Court, U.S.
FILED
AUG 13 1982
TEXAS.

No. 81-2359

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,

Petitioners,

vs.

PHONETELE, INC.,

Respondent.

On Appeal from the United States District Court for the Central District of California.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS

Page

Introductory Statement 1

Procedural Maturity of the Case Below 4

Argument 5

I.

Petitioners Have Misled This Court by Suggesting They Had Been Placed in an Insoluble Dilemma by the Carterfone Decision 5

II.

There Is No Inconsistency Between Public Interest Standards Applied by the FCC and Antitrust Standards 8

III.

There Is No Pervasive Regulation Which Could Possibly Give Rise to an Implied Immunity 12

IV.

The Core of the Relevant Inquiry Must Center Upon Legislative Intent 13

V.

The Decision Below Is Correct and No Writ Should Issue 14

Conclusion 17

TABLE OF AUTHORITIES

Cases	Page
California v. FPC, 369 U.S. 482 (1962)	8, 14
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)	9, 10
Carnation v. Pacific Westbound Coal, 383 U.S. 213 (1966)	14
Carter v. AT&T, 365 F.2d 486 (5th Cir. 1966)	17
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	14
Community Communications Co. v. Boulder, Colo., 50 USLW 4144 (January 13, 1982)	14
Essential Communications Systems, Inc. v. AT&T, 610 F.2d 1114 (3rd Cir. 1979)	2
Gordon v. New York Stock Exchange, 422 U.S. 659 (1974)	10, 11, 13
Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 202 (1979)	15
Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974)	11
Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. 1956)	7
Industrial Communications Systems, Inc. v. Pacific Tel. and Tel. Co., 505 F.2d 913 (9th Cir. 1975)	2
Mid-Texas Communications Systems, Inc. v. AT&T, 615 F.2d 1372 (5th Cir. 1980)	1, 2
Morton v. Mancari, 417 U.S. 540 (1974)	14
National Gerimedical Hospital v. Blue Cross, 452 U.S. 378 (1980)	13
New York State Chiropractic Ass'n v. Pireno, 50 USLW 4911 (June 28, 1982)	14
North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1977), cert. denied 434 U.S. 874 (1977)	4, 5, 6

Page

Northeastern Telephone Company v. AT&T, 651 F.2d 76 (2d Cir. 1981) 2, 12

Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) 11

Ottertail Power Company v. United States, 410 U.S. 366 (1973) 8, 16

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 10

Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981) 5, 7

Phontele, Inc. v. Public Util. Comm'n, 11 Cal.3d 125 (1974) 7

Radsanower v. Touche Ross & Co., 426 U.S. 151 (1976) 14

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 3

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 8, 9, 12, 13

Sound, Inc. v. AT&T, 631 F.2d 1324 (8th Cir. 1980) 1, 11

United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1974) 10, 11, 13

United States v. RCA, 358 U.S. 334 (1959) .. 8, 11, 16

Statutes

§19(b)(9), Securities Exchange Act 11

§22(f), Securities Exchange Act 11

47 U.S.C. §§151, 201 8

§411, Federal Aviation Act 10

§221(a), Communications Act 14

Agency Decisions

Page

AT&T (Dataphone), In re (Docket No. 20288), 63 FCC 2d 774 (1977) 9

Carterfone, 13 FCC 2d 420, 14 FCC 2d 149 (1968), 14 FCC 2d 571 (1968), 15 FCC 2d 605 (1968) 5, 6, 7, 8, 15, 16, 17

Customer Interconnection (Docket 20003), 61 FCC 2d 766 (1976) 10

Interstate and Foreign MTS and WATS (Docket No 19528), 35 FCC 2d 539 (1972), 53 FCC 2d 219 (1975), 56 FCC 2d 593 (1975), 58 FCC 2d 736 (1976), 59 FCC 2d 83 (1976), 64 FCC 2d 1039 (1977) 4, 8

Interstate and Foreign MTS and WATS (Docket No. 20288), 57 FCC 2d 1216, 1229 (1976) 6, 9, 10

Jordaphone Corp. v. AT&T et al., 18 FCC 644 (1954) 6

Primary Instrument Concept, 68 FCC 2d 1157, 1163-1164 (1978) 10, 17

Recording Devices, In The Matter of, 11 FCC 1033 (1947) 6

Treatises, Articles, and Other

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Microelectronics, Vol. 27, No. 3, p. 63 (Sept. 1977) 17

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No. 81-2359

IN THE

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,

Petitioners,

vs.

PHONETELE, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introductory Statement.

The instant petition requests this Court to review an issue of law which is now well settled. Indeed, to find a more settled issue would be difficult.

Four circuits have already squarely ruled against the Petitioners on precisely the same issue. These circuit court cases involve facts which are indistinguishable from the instant case. Therefore, there is no reason for this Court to invoke its jurisdiction on the question of implied immunity of the Bell System from the antitrust laws.[1] See *Sound, Inc. v. AT&T*, 631 F.2d 1324 (8th Cir. 1980); *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372 (5th

[1]As used herein, the Bell System means the three named defendants as well as the 23 operating companies (wholly or partly owned by AT&T), named in the complaint as unnamed co-conspirators. Defendant Western Electric is wholly-owned by AT&T. Western Electric and AT&T each own one-half of defendant Bell Laboratories.

Cir. 1980), cert. den. 449 U.S. 912 (1980); *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114 (3rd Cir. 1979); *Northeastern Telephone Company v. AT&T*, 651 F.2d 76 (2d Cir. 1981).

Though the question may be an important one to Petitioners, it has already been decided in an harmonious fashion. Respondent suggests that the District of Columbia Circuit, where the Government's case of *United States v. AT&T*, ("Government's case") has been pending would also be in agreement with the 2nd, 3rd, and 5th and 8th Circuit cases, cited above, holding no implied immunity. Counting the 9th Circuit and the District of Columbia Circuit, six circuits are in agreement and no circuits are to the contrary. Even before the instant case, the 9th Circuit had already settled the implied immunity issue against Petitioners. *Industrial Communications Systems, Inc. v. Pacific Tel. and Tel. Co.*, 505 F.2d 913 (9th Cir. 1975). Moreover, all Circuit Court judges have voted in favor of no implied immunity; none of the cases have a dissent by a Circuit Court judge.[2]

The opinion in the instant case is a quality-crafted one authored by Circuit Judge Kennedy. On page ii of their Petition, the Petitioners frame their question of Judge Kennedy's opinion in a misleading and unacceptable fashion. Specifically, in Petitioners' formulation, jurisdiction is assisted over them "soley as pervasively regulated common carriers". This wording is patently incorrect in several respects. First, two of the named defendants, Western Electric Company and Bell Telephone Laboratories are not regulated common carriers at all. These two companies are merely

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[2]In the instant case, there was a dissent by the District Court judge sitting by designation.

unregulated co-conspirators, one a manufacturer, the other, a product development company. (See pp. 14-15, *infra*.)

Moreover, as framed by the Petitioners, the self-characterization as "pervasively" regulated common carriers is untrue. Cases by this Court hold that implied immunities have been denied both in the energy and banking industries, where far more regulation is exercised than over either telephone terminal equipment or the defendants, themselves. All of the Circuit Court decisions cited above have specifically rejected the pervasiveness contention, finding that although some regulation takes place as to part of the affiliated corporate components of the Bell System, it is simply not pervasively regulated.

Finally, as the Petitioners have framed the question, they posit that the Communications Act "prescribes a public interest standard governing the challenged conduct inconsistent with that of the antitrust laws." Again, contrary to such assertions, all of the above Circuit cases found that there is no inconsistency between the Communications Act standard and that of the antitrust laws. Also, the publicly stated position of the Federal Communications Commission ("FCC") is that there is no inconsistency between the two standards (See the FCC's *amicus curiae* brief filed in the Government's case, *United States v. AT&T*, appearing at 62 FCC 2d 1102 (1975). In its *amicus curiae* brief, the FCC stated, "The Commission has never considered its authority over equipment interconnection to displace the antitrust laws." 62 FCC 2d at 1114. An agency's construction of its legislation is entitled to deference. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). There should, accordingly, be no immunity in the instant case.

Procedural Maturity of the Case Below.

The instant case was before the 9th Circuit (as well as the District Court) in an entirely matured posture. The primary jurisdiction of the FCC had already been exhausted by way of extensive FCC consideration of the primary jurisdiction issues in years past. *Interstate and Foreign MTS and WATS*, (Docket No. 19528), 35 FCC 2d 539 (1972), 53 FCC 2d 219 (1975), 56 FCC 2d 593 (1975), 58 FCC 2d 736 (1976), 59 FCC 2d 83 (1976), 64 FCC 2d 1039 (1977), aff'd sub nom. *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977). See also the FCC's discussion of primary jurisdiction in its *amicus curiae* brief, *supra*, 62 FCC 2d at 1118-1119.

In short, only the antitrust issues remain and there is no sound reason why the Bell System should enjoy any implied immunity from antitrust jurisdiction. Most of the arguments advanced by Petitioners are either primary jurisdiction arguments, no longer valid in the procedural setting of the instant case, or are arguments on the merits, inapplicable at this pretrial stage of the proceeding. On July 19, 1982 the Honorable Malcolm M. Lucas denied Petitioners' motion for a stay of the proceedings in the District Court. Discovery is now going forward.

ARGUMENT.

I.

Petitioners Have Misled This Court by Suggesting They Had Been Placed in an Insoluble Dilemma by the *Carterfone* Decision.

The pervading theme of the Petition is that Petitioners were placed in an untenable position with the introduction of terminal equipment competition, generally referred to as "customer-provided equipment". (Petition at pp. 9-13, particularly pp. 9-10) The Court should reject these arguments out of hand. At best these arguments might go to the merits of the antitrust claim, but they are irrelevant for purposes of the implied immunity issue. See *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 740 (9th Cir. 1981).

The Petitioners' "Statement of the Case" suggests the Bell System was placed in an untenable dilemma by the FCC's asserted change of policy in *Carterfone*.[3] Like most yarns, this may bear a thread of truth but does not lend any weight to the overall preposterous argument of the Petitioners. The element of truth is that there the FCC's position favoring more liberalized interconnection squarely challenged the long-held monopoly enjoyed by the Bell System over telephone terminal equipment. This *"preservation of the carriers' private law-making authority over independent manufacturers"* was expressly recognized as the Petitioners' goal to be achieved in *North Carolina Utilities Comm'n v. FCC, supra*, 552 F.2d at 1051. (Emphasis is the Court's) This decision, generally referred to as "North Carolina II", ended the Bell System's long and relentless challenge to the FCC's registration program. (See, for example, 57 FCC 2d

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[3]*Carterfone* is fully cited, 13 FCC 2d 420, 14 FCC 2d 149 (1968), reconsideration denied, 14 FCC 2d 571 (1968), 15 FCC 2d 605 (1968).

at 1218 where the FCC commented on the Bell System's dilatory tactics.) Though the Petition fails to disclose the finding to the Court, in these hearings the FCC found the Bell System's post *Carterfone* interconnection tariffs "unlawfully discriminatory" and "unlawfully restrictive." (see 58 FCC 2d at 746). North Carolina II affirmed this specific finding on appeal by noting that the tariffs "are themselves unlawful." 552 F.2d at 1056. This tariff, already found unlawful, is part of the anticompetitive background of Phonetele's complaint.

The Petitioners fail to relate that they had many years to prepare for the more liberalized interconnection prior to *Carterfone*. Indeed, the FCC had given significant early indications long before *Carterfone* that a more liberalized interconnection policy would evolve. For example, in 1947, in the case titled *In The Matter of Recording Devices*, 11 FCC 1033 (1947), the Commission unambiguously concluded in part that,

> Insofar as any tariff regulations now on file with this Commission have the effect of barring the use of recording devices . . . such tariff regulations are unjust and unreasonable, and, therefore, unlawful under the provisions of section 201 of the Communications Act. 11 FCC at 1055-1056.

Seven years later in regards to another type of customer-provided equipment, automatic answering devices, the Commission took a similar and even stronger position in the case of *Jordaphone Corp. v. AT&T et al.*, 18 FCC 644 (1954). In *Jordaphone*, the FCC again concluded that foreign attachment provisions in the Bell System's tariffs were "unjust, unreasonable, and therefore unlawful . . ." 18 FCC at 671. Finally, in 1956, a very insignificant case was before the Commission regarding the Hush-A-Phone device.

The Commission at first found that the Hush-A-Phone device, which was a cup-like device to improve the privacy of telephone conversations, impaired telephone service. The Court of Appeals for the District of Columbia reversed. *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. 1956). On remand, the Commission ordered AT&T to file revised tariff schedules,

> . . . rescinding and cancelling any tariff regulations to the extent that they prohibit a customer from using, in connecting with interstate or foreign exchange service, the Hush-A-Phone device *or any other device* which does not injure defendants' [the Bell System's] employees, facilities, the public in its use of defendants' services, or impair the operation of the telephone system. *Hush-A-Phone*, 22 FCC 112, 114 (1957), on remand; [emphasis and brackets added].

Therefore, the suggestion — indeed primary argument — of the Petitioners that *Carterfone* somehow caught them by surprise and placed them in an untenable dilemma, is patently ridiculous in view of FCC decisions over the 21 years predating *Carterfone*. The handwriting was "on the wall." This point was correctly relied upon by the 9th Circuit in its opinion below. (See *Phonetele, Inc. v. AT&T et al., supra* at 664 F.2d 716, 730, particularly footnotes 36 and 38.) The professed Bell System dilemma is a sham.

In truth, the only dilemma the Bell System has faced is how to circumvent for over 35 years the FCC's directives and adverse court cases for more liberalized interconnection and, at the same time, avoid antitrust jurisdiction. (See, for example *Phonetele, Inc. v. Public Util. Comm'n*, 11 Cal.3d 125 (1974).) The Bell System's conduct in avoiding more liberalized interconnection of customer-provided equipment is nothing less than a sweeping, fraudulent and monopolistic course of conduct. Petitioners' argument as to the merits

have no standing in this Court's consideration of jurisdiction.

The Bell System has basically been trapped by its own tired position that they have the responsibility for "end-to-end service." The Bell System to this very day, still continues to espouse the "end-to-end service" as their own concept of the public interest. In 1978, the contention was rejected once again by the FCC in explicit and pertinent language which could leave no doubt,

> The contention that one telephone set is an integral part of basic service is essentially, in our view, merely another form of the oft-rejected argument that the telephone company must have one complete end-to-end service responsibility. We expressly rejected this end-to-end responsibility argument in *Carterfone*. (13 FCC 2d at 422) and again in the *Second Report in Docket No. 19528* (58 FCC 2d at 739-740).

II.

There Is No Inconsistency Between Public Interest Standards Applied by the FCC and Antitrust Standards.

By law, the FCC applies a "public interest" regulatory standard. (47 U.S.C. §§151, 201) Several important decisions of this Court have squarely held that a public interest standard is not incompatible with antitrust jurisdiction. *United States v. RCA*, 358 U.S. 334 (1959), involving Title III of the Communications Act; *California v. FPC*, 369 U.S. 482 (1962); *Ottertail Power Company v. United States*, 410 U.S. 366, 373 (1973).

The proper test for reconciling a regulatory to an antitrust statutory scheme was set out in 1963 in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). In *Silver*, this Court held an immunity would be implied ". . . only if necessary to make [the regulatory scheme] work, and even then only

to the minimum extent necessary." 373 U.S. at 355-356 (brackets added). In *Silver*, this Court articulated that the proper showing required was that of a necessary and complete ouster compelled by the incompatibility between the two schemes. There must be a "irreconcilable conflict" between the two schemes. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-597 (1976) rejected the Bell System position in 1976. In *Cantor*, the Court remarked,

> *Amicus curiae* forcefully contend that the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the 'public interest' standard widely enforced by regulatory agencies . . . .[4] *Cantor* at 595.

In *Cantor*, this Court found against the *Amicus curiae* position and found no implied immunity. The critical language stated:

> On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy. *Cantor* at pp. 595-596.

In 1976, the FCC articulated the doctrine of "full and fair competition" for the telephone terminal equipment market. *Interstate and Foreign MTS and WATS*, (Docket No. 20288), 57 FCC 2d 1216, 1229 (1976); see also *In re AT&T (Dataphone)*, (Docket No. 20288), 63 FCC 2d 774, 798 (1977). The FCC has recognized the terminal equipment market is not a natural monopoly market as is the market

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[4]In *Cantor*, the "amicus curiae" was the Bell System.

for basic telephone service. In *Customer Interconnection* (Docket 20003), 61 FCC 2d 766, 867 (1976), the FCC stated, ". . . we find no evidence . . . that there is a natural monopoly in the provision of terminal equipment . . ." See also *Primary Instrument Concept*, 68 FCC 2d 1157, 1163-1164 (1978). At the same period of time, the Commission noted:

> The Commission is confronted here with the difficult task of assuring that the benefits of full and fair competition will flow to the public, while minimizing to the greatest extent possible the intrusion of bureaucracy into the marketplace. *Interstate Foreign MTS and WATS*, (Docket No. 20288), 57 FCC 2d 1216, 1229 (1976).

The FCC has been moving for years to full and fair competition in the telephone terminal equipment market. This has resulted in the customer being given a free choice to choose his equipment from among many available suppliers. At the same time, the Commission has minimized to the greatest extent possible the intrusion of its regulation into this marketplace. To the extent regulation exists in the registration program, the law is that regulated industries are not *per se* exempt from antitrust jurisdiction. *Gordon v. New York Stock Exchange*, 422 U.S. 659, 688-689 (1974); *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 719-720 (1974); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-597 (1976), particularly note 36.

When the FCC applies its public interest standard, it is charged with a far different statutory grant than was found in a case like *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). In *Pan American*, this Court found an immunity based, in part, upon the regulatory jurisdiction under §411 of the Federal Aviation Act which granted specific antitrust jurisdiction (*e.g.*, "unfair methods

of competition"). Such jurisdiction is not conferred to the FCC by the Communications Act under which respondents are regulated. *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959). The two principal cases relied upon by Petitioners also found an immunity, based in part, on express statutory grants that necessarily required the Securities and Exchange Commission to approve conduct otherwise violative of the antitrust laws. *United States v. National Ass'n of Securities Dealers, supra*, at 727-728 discussing §22(f) of the Securities Exchange Act; *Gordon v. New York Stock Exchange*, at 689 discussing §19(b)(9) of the Securities Exchange Act.

In the exercise of the FCC's jurisdiction, the law is well established that competition is one of the components of the FCC's public interest standard. *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) In the telephone terminal equipment area, the FCC, as pointed out above, has clearly indicated a conscious, expressed desire to pronounce, in its sound judgment, that the public interest requires full and fair competition in this non-natural monopoly market for customer-provided equipment.

At this same time, the Sherman Act was designed to be the comprehensive "charter of economic liberty" aimed at preserving competition. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Even if there were some differences in the public interest standard applied by the FCC, and the competition standard applied by antitrust courts, there can be no difference that approaches the type of irreconcilable difference that would require an ouster of the antitrust laws. If anything, the similar policies to be achieved complement each other.

> . . . the maintenance of an antitrust suit will not conflict with the operation of the regulatory scheme authorized

by Congress but will supplement that scheme. *Sound, Inc. v. AT&T, supra*, at 1330.

No Circuit has yet agreed with Petitioners that any inconsistency exists in this precise area of statutory balancing. Each of the five Circuit Courts holding that antitrust jurisdiction over Petitioners is proper has applied the law as it is required to do. That is, these courts have endeavored to accommodate the simultaneous working of the regulatory scheme with the antitrust laws. See *Silver v. New York Stock Exchange, supra*. The result has not been to Petitioners' liking.

III.

There Is No Pervasive Regulation Which Could Possibly Give Rise to an Implied Immunity.

The remaining principal thrust of the Petition is on the ground of "pervasive" regulation. Recently, the 2d Circuit Court of Appeals correctly remarked as to the Bell System's pervasive regulation argument that it is a "vague ground". The Court continued, "The pervasiveness of a regulatory scheme is not susceptible of precise qualification, See 1 P. Areeda and D. Turner, *Antitrust Law*, ¶224 (1978)." *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 83 (2d Cir. 1981). After giving cursory dismissal to an argument framed in terms of pervasiveness, the *Northeastern Tel. Co.* Court then stated, "The more focused inquiry is whether the industry is so extensively regulated that application of the antitrust laws would be incompatible with the regulatory framework, that is, whether immunity must be inferred to make the system work." *Northeastern Tel. Co. v. AT&T, supra*, at 83.

This is the proper inquiry to approach the accommodation of the two regulatory schemes. As stated this is the test which found its inception in *Silver v. New York Stock Ex-*

change, supra, at 357 and is the proper test for the instant case. See *United States v. National Association of Securities Dealers, Inc., supra*, at 734; *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 389 and 392 (1980). No Circuit Court case can be found which holds that the Communication's Act pervasively regulates the Bell System to the extent that ouster of the antitrust laws is necessary in order to make the regulatory scheme work. To the contrary, all of the cases cited *supra* at pp. 1-2, have rejected the argument that there has been such pervasive regulation of AT&T, or any of its affiliates, as to give rise to a repealer. There is no basis on the Petition's alternate ground for the Court to grant Certiorari.

IV.

The Core of the Relevant Inquiry Must Center Upon Legislative Intent.

The reason the Petitioners have lost all five Circuit Court cases on the implied immunity issue is simple. There is no legislative history whatsoever which reveals a legislative intent to repeal the antitrust laws. *National Gerimedical* case states the rule that the legislative intent "must be clear." In *National Gerimedical Hospital v. Blue Cross, supra*, at p. 389, the Court stated, "To be sure, where Congress did intend to repeal the antitrust laws, that intent governs. . . ." In making this statement, this Court cited *United States v. National Association of Securities Dealers, supra*, and *Gordon v. New York Stock Exchange, supra*, the two cases principally relied upon by the Petitioners. This Court has noted that *Gordon* and *NASD* soundly rest upon legislative intent analysis. On the question of legislative intent, this Court has also recently stated that the intent to repeal must be unambiguous and, in fact, must demonstrate

". . . some affirmative showing of an intention to repeal. . . ." *Morton v. Mancari*, 417 U.S. 540, 550 (1974); *Radsanower v. Touche Ross & Co.*, 426 U.S. 151, 164 (1976).

V.

The Decision Below Is Correct and No Writ Should Issue.

Recent decisions of the Court have disfavored implied immunities from the antitrust laws. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. Boulder, Colo.*, 50 USLW 4144 (January 13, 1982); *New York State Chiropractic Ass'n v. Pireno*, 50 USLW 4911 (June 28, 1982). Implied immunity of the Bell System has accordingly been examined and rejected time after time in the five Circuit cases cited as well as in numerous District Court cases. There is no reason, other than desperation, to suggest why this Court should examine this specific well-settled issue.

Secondly, Section 221(a) of the Communications Act contains an express antitrust exemption for telephone utilities. This Court has commented in similar instances,

> We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one. *California v. Federal Power Comm'n, supra*, at 485.

When unequivocal statutory exemptions shield specified conduct but fail to protect other conduct, this Court has concluded that Congress made a deliberate choice to exempt only the narrowly specified conduct, *Carnation v. Pacific Westbound Coal*, 383 U.S. 213, 220 (1966).

Thirdly, in the instant case, the named defendants include AT&T, Western Electric Company, and Bell Telephone Laboratories. The latter two companies, AT&T affiliates, are not regulated utilities as is defendant AT&T. Western

Electric merely is an equipment manufacturer and Bell Laboratories is a product development company. The complaint in the instant case alleges conspiracy to restrain trade among the three named defendants as well as among the numerous unnamed co-conspirators, which comprise the rest of the Bell operating companies. This Court recently stated that:

> . . . an exempt entity forfeits antitrust exemption by acting in concert with non-exempt parties . . . *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 202, 231 (1979).

By the same reasoning as in *Royal Drug*, the conspiracy in the instant case involving regulated companies with non-regulated companies likewise constitutes an independent ground to support a finding that none of the named defendants should be impliedly exempt from the antitrust laws.

Finally, the tariff in the instant case merely embodies the raw business judgment of the Bell system. In striking down the tariff in the *Carterfone* decision, the FCC stated the following as part of its rationale concerning the tariff:

> Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission. It has remained subject to complaint into a finding that has been unlawful since its inception . . . But where the carrier itself initiates the right or practice, its lawfulness remains open, not only to a prospective finding, but also to a retroactive one . . . and it is not a bar to such a finding of past unlawfulness that the tariff has been permitted to remain in effect and has not, until now, been the subject of a determination as to its lawfulness. *Carterfone*, 13 FCC 2d 420, 425 (1968).

The post-*Carterfone* tariff, which required utility-provided connecting arrangements in regards to installations of customer-provided equipment, is in the background of the instant case. Like the tariff stricken down in *Carterfone*,

this later tariff has never been approved by the Commission. See particularly the dissenting opinion of FCC Commisioner Nicholas Johnson in the *Carterfone* decision on reconsideration, 15 FCC 2d 605, 614-617 (1968). Respondent draws the Court's attention to the FCC's *amicus curiae* brief in which the FCC confirms that the tariff in question in the instant case has not been approved by the Commission. The Commission pointed out in a footnote in this regard that in a 12-month period between September, 1974 through August, 1975 the FCC received 1,371 tariff filings totaling 11,491 pages. The footnote continued that the Commission could investigate only a small percentage of these filings. See FCC's *amicus curiae* brief, 62 FCC 2d 1102, 1115 (1975).

The many cases by this Court in which implied immunity has been denied have focused upon this business judgment aspect of the tariffs in question. In *Ottertail*, the Court commented in now a classic articulation:

> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not by regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. *Ottertail Power Co. v. United States, supra*, at 374, citing *United States v. Radio Corp. of America, supra*, involving Title III of the Communications Act.

Therefore, the "regulation" that the petitioners urge is, in actuality, no regulation at all, but merely tariffs which are filed with a regulatory body, the FCC.

Conclusion.

The five circuits are in harmony. Each one has refused to legislate by writing an implied exemption from antitrust jurisdiction into the Communications Act. No express immunity from the antitrust laws is granted by the Communications Act in regards to the conduct in question, though an express exemption for unrelated conduct is provided. Simply stated, the reason this Court should not entertain the requested Writ of Certiorari is that the Petitioners are asking this Court to legislate.

All cases decided by this Court which have found an implied immunity from antitrust jurisdiction have been coupled with a rationale and a finding of clear legislative intent to exempt the subject conduct. In the instant case the Petitioners have not even presented an argument that such a legislative intent exists, for none can be made. Therefore, they are compelled to omit the argument entirely rather than to expose its hollowness.

Customer-provided telephone equipment is a market which since *Carterfone* in 1968 has experienced innovation rivaling the computer industry. Technology, not regulatory fiat, has caused this market to mushroom.[5] Users of telephone equipment are now allowed to choose from a variety of suppliers. The FCC has specifically found that ". . . the competitive equipment marketplace has stimulated innovation . . ." and "has . . . afforded the public a wider range of terminal choices and other benefits . . ." *Primary Instrument Concept, supra*, at 1175.

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[5]See *Carter v. AT&T*, 365 F.2d 486, 490 (5th Cir. 1966); *Structure and Performance of the U.S. Communications Industry*, Berchardt (Division of Research Graduate School of Business Administration, Harvard University, Boston, 1970) at p. 3; "Scientific American"; *Microelectronics*, Vol. 27, No. 3 (Sept. 1977) at p. 63.

The Petition, moreover, does not present any concrete arguments or reasons why the Bell Companies should be given an implied immunity from competition. Vague concepts such as inconsistent standards and pervasiveness of the regulatory scheme lack necessary precision and, when scrutinized, clearly do not find any support on the facts of the instant case to suggest that the decisions of the five Circuit Courts denying immunity are incorrect.

In closing, Respondent draws the Court's attention, by Judicial Notice, to an irony of immense proportions now taking place. At this very time, the Bell System has announced in the public record of the United States District Court for the District of Columbia that it concedes antitrust court jurisdiction by its entering into a proposed consent decree in the *United States v. AT&T*. This case specifically involves antitrust violations of the customer-provided equipment market. Simultaneously, by the instant Petition the Bell System is asking this Court to hold it immune from the antitrust Court jurisdiction. This dilemma stems from a far greater inconsistency — lack of candor — than any of which Petitioners complain in the Petition.

Dated: August 11, 1982.

Respectfully submitted,

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No. 81-2359

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,
Petitioners,

—against—

PHONETELE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
ARGUMENT	
An Important Issue of Implied Antitrust Immunity Warranting Review By This Court Is Presented By This Case	2
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	PAGE
American Tel. & Tel. Co. v. United States, No. 77-1009 (D.C. Cir., May 26, 1977), *cert. denied*, 434 U.S. 966 (1977)	3
California v. FPC, 369 U.S. 482 (1962)	6
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	6
City of Miami v. Florida Pub. Serv. Comm'n, 208 So.2d 249 (Fla. 1968)	5
Essential Communication Systems, Inc. v. American Tel. & Tel. Co., 610 F.2d 1114 (3rd Cir. 1979), *rev'g* 446 F.Supp. 1090 (D.N.J. 1978)	3, 4
Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972)	5
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	1, 2, 5
Group Life & Health Insurance Co. v. Royal Drug Co., Inc., 440 U.S. 205 (1979)	6
Houston v. Southwestern Bell Telephone Co., 259 U.S. 318 (1922)	5
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	6
International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913 (9th Cir. 1975)	6
Jeffrey v. Southwestern Bell Telephone Co., 518 F.2d 1129 (5th Cir. 1975)	5
Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980)	3
Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978)	6
Northeastern Telephone Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3650 (Feb. 22, 1982)	3

PAGE

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 6

Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981) 3, 4

Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930) 5

Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir. 1980) 3, 4

Terminal Warehouse Co. v. Pennsylvania R. R., 297 U.S. 500 (1936) 6

United States v. American Tel. & Tel. Co., 427 F.Supp. 57 (D.D.C. 1976) 3

United States v. American Tel. & Tel. Co., 461 F.Supp. 1314 (D.D.C. 1978) 3

United States v. National Association of Securities Dealers, Inc., 422 U.S. 695 (1975) 1, 2

Woodlands Telecommunications Corp. v. American Tel. & Tel. Co., 447 F.Supp. 1261 (S.D. Tex. 1978) 3

Regulatory Proceedings:

Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (Docket No. 20828), 72 F.C.C.2d 358 (1979) 5

AT&T, Charges for Interstate Telephone Service (Docket No. 19129):

38 F.C.C.2d 213 (1972) 5

64 F.C.C.2d 1 (1977) 5

AT&T, Investigation into the Lawfulness of Tariff F.C.C. No. 267, Offering a Dataphone Digital Service Between Five Cities (Docket No. 20288), 50 F.C.C.2d 501 (1974) 5

AT&T, Revisions of Tariffs F.C.C. Nos. 259 and 260 (Docket No. 19419), 33 F.C.C.2d 518 (1972) 4

Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures (Docket No. 20003), 61 F.C.C.2d 766 (1976) 5

PAGE

Pacific Northwest Bell Tel. Co., 92 P.U.R.3d 433 (Or. Pub. Util. Comm'r 1971) 5

Pacific Tel. & Tel. Co., 86 P.U.R.3d 497 (Cal. Pub. Utils. Comm'n 1970) 5

Pacific Tel. & Tel. Co., 87 P.U.R.3d 487 (Cal. Pub. Utils. Comm'n 1970) 5

Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Docket No. 16979), 28 F.C.C.2d 267 (1971) 5

Southern Bell Tel. & Tel. Co., 3 P.U.R.4th 406 (S. C. Pub. Serv. Comm'n 1973) 5

Southern New England Tel. Co., Docket No. 11200 (Conn. Pub. Utils. Comm'n, April 21, 1972) 5

Southwestern Bell Tel. Co., 98 P.U.R.3d 30 (Kan. Corp. Comm'n 1973) 5

Statutes and Court Rules:

All Writs Act, 28 U.S.C. § 1651 3

Clayton Anti-Trust Act, 15 U.S.C. § 16(i) 7

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* ... 2
§ 205(a) 4
§ 214(d) 4
§ 215(a) 4
§ 221(a) 6

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 6

Shipping Act, 46 U.S.C. § 814 7

Sup. Ct. R. 17.1(c) 2

Other Materials:

"Modification of Final Judgment" in *United States v. Western Electric Co., Inc.*, Civil Action No. 17-49 (D.N.J., filed Jan. 11, 1982), *reprinted at* 5 *Trade Reg. Rep.* (CCH) ¶ 50,807 7

No. 81-2359

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
WESTERN ELECTRIC COMPANY, INC., AND
BELL TELEPHONE LABORATORIES, INC.,

Petitioners,

—against—

PHONETELE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners submit this reply in further support of their petition that a writ of certiorari be issued to review the judgment herein of the United States Court of Appeals for the Ninth Circuit. The Brief in Opposition submitted by respondent largely avoids the issue presented by the Petition: the conflict between regulation and the antitrust laws. The decision below adopts a test for the accommodation of the legal standards of the antitrust laws and the Communications Act of 1934 that squarely conflicts with this Court's decisions in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), as well as with

its precedents holding that conduct pervasively regulated under common carrier principles is immunized from antitrust attack. This conflict presents an important federal issue of continuing vitality which warrants review by this Court. *See* Sup. Ct. R. 17.1(c).

ARGUMENT

AN IMPORTANT ISSUE OF IMPLIED ANTITRUST IMMUNITY WARRANTING REVIEW BY THIS COURT IS PRESENTED BY THIS CASE

A critical legal question, starkly presented by this case, is whether a finding of implied antitrust immunity arises from the existence of a "conflict in standards" between the antitrust laws and the regulatory statute at issue, which is the teaching of *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), or, instead, from a "conflict in fact" between the application of the antitrust standard and particular regulatory policies adopted at a given time by the agency, upon which the Court of Appeals focused in the instant case. An equally significant question, also presented here, is whether, consistent with this Court's prior decisions (*see* Petition at 20-23), antitrust jurisdiction may extend to conduct, such as petitioners' interconnection tariffs, that is subject to pervasive, common carrier regulation.

These issues are neither "well settled" in a majority of the circuits, as respondent asserts (Brief in Opposition at 1), nor are they important only to the particular litigants. Rather, the opinions of the Court of Appeals in this case and of the only two other appellate courts which have had occasion to deal with the issue reveal markedly different analyses by those courts of the scope of regulation under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976), and of the extent of any implied antitrust immunity thereby conferred. More significantly, the opinion of the court below demonstrates a fundamental misunderstanding

of, and conflict with, this Court's decisions regarding accommodation of the antitrust and regulatory regimes that is of substantial public importance and warrants plenary review by this Court.

Contrary to respondent's claim, the question of implied antitrust immunity for the interconnection tariffs at issue in this case has not been decided by the Second, Fifth or District of Columbia Circuits.[1] That issue previously has been treated, with disparate analyses, in *Sound, Inc. v. American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980), and *Essential Communication Systems, Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3rd Cir. 1979), *rev'g* 446 F. Supp. 1090 (D.N.J. 1978).

Like the decision in the instant case, the Eighth Circuit in *Sound* looked to the FCC's exercise of its authority under the regulatory scheme, rather than to the legal standard under which the agency exercised its authority. 631 F.2d at 1330. It then based its finding that petitioners' conduct was not immune from

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1. *Northeastern Telephone Co. v. American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3650 (Feb. 22, 1982), cited by respondent, did not involve a challenge to the legality of petitioners' post-*Carterfone* tariffs, but only, insofar as is relevant here, the narrow issue of the design of protective connecting arrangements provided under those tariffs. 651 F.2d at 81, 94. *Northeastern* thus involved a far more limited context than that presented here, as the Court of Appeals acknowledged. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 742 n.65 (9th Cir. 1981); A-44-45.

Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), found no implied antitrust immunity with respect to the initial refusal of one telephone common carrier to connect its facilities with those of another, an entirely different issue from that presented here and a matter which the district court had found was "itself not subject to regulatory supervision." *Woodlands Telecommunications Corp. v. American Tel. & Tel. Co.*, 447 F. Supp. 1261, 1265-66 (S.D. Tex. 1978).

Finally, respondent's conclusion that the District of Columbia Circuit "would also be in agreement" on the issue (Brief in Opposition at 2) is evidently based solely upon its own speculation as to any eventual review on the merits of the district court opinions in *United States v. American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976), 461 F. Supp. 1314 (D.D.C. 1978), a case involving a far broader claim of implied antitrust immunity. Petitioners unsuccessfully sought interlocutory review of that decision pursuant to the All Writs Act, 28 U.S.C. § 1651. *American Tel. & Tel. Co. v. United States*, No. 77-1009 (D.C. Cir., May 26, 1977), *cert. denied*, 434 U.S. 966 (1977).

antitrust attack upon its conclusion that the FCC's decisions "have not reflected an approval of Bell's interconnect-related conduct" and that therefore "the maintenance of an antitrust suit will not conflict with the operation of the regulatory scheme. . . ." *Id.* In the single other decision with respect to this issue, the Third Circuit in *Essential* interpreted the Communications Act of 1934 as governing only the relationship of common carriers with subscribers, and thus concluded that there can be no implied antitrust immunity when a competitor sues under the antitrust laws, even though there would likely be such immunity if a customer brings an antitrust suit.[2]

Respondent also asserts that the issue for review as framed in the Petition is not actually presented by this case because it is "patently incorrect" that petitioners Western Electric and Bell Laboratories (respectively, the manufacturing and research and development organizations of the Bell System) are subject to pervasive common carrier regulation. Brief in Opposition at 2. That assertion is wrong on two grounds. First, the FCC's statutory mandate confers ample control over the functions of these entities through its comprehensive regulation of their common corporate parent, petitioner American Telephone and Telegraph Company ("AT&T"). *See, e.g.*, 47 U.S.C. §§ 205(a), 214(d) (authorizing FCC to assure provision of adequate service and facilities); *cf. id.* § 215(a) (imposing agency duty to "examine transactions entered into by any common carrier which relate to the furnishing of equipment . [or] research"). Over the years, the FCC has repeatedly exercised its statutory authority to examine the various facets of Western's operations,[3] and in Phase II of Docket 19129, the Commission undertook an investigation encompassing "all ramifications of the relationship of Western

2. The Court of Appeals in the instant case declined to follow *Essential* and explicitly expressed its own "doubt regarding th[at] court's interpretation of the [Communications] Act's history." 664 F.2d at 734 n.46; A-37.

3. As part of formal docket proceedings, the FCC has considered alternatives to procurement from Western, *AT&T, Revisions of Tariffs F.C.C. Nos. 259 and 260* (Docket No. 19419), 33 F.C.C.2d 518 (1972); vertical integration in the Bell System, *Economic Implications and Interrelationships Arising from Policies and Practices Relating to*

Electric to the Bell System," as well as aspects of the role of Bell Laboratories. *AT&T, Charges for Interstate Telephone Service* (Docket No. 19129), 38 F.C.C.2d 213, 244 (1972), 64 F.C.C.2d 1 (1977). Moreover, this Court long ago noted that Western's prices and rate of return may properly be subjected to scrutiny by state regulatory commissions as part of the ratemaking process. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930); *Houston v. Southwestern Bell Telephone Co.*, 259 U.S. 318 (1922). In the exercise of that mandate, many states in the ensuing years have conducted inquiries into numerous aspects of that company's operations.[4]

But even without such comprehensive regulatory scrutiny of their business activities, respondent's assertion that immunity may be defeated by these two entities' mere status as named defendants is without merit. Courts in similar cases have repeatedly dismissed antitrust claims against both regulated and unregulated companies on the basis of implied immunity. *See, e.g., Gordon, supra*; *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *accord, Jeffrey v. Southwestern Bell Telephone Co.*, 518 F.2d 1129 (5th Cir. 1975). Thus, in *Gordon*, this Court, having

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Customer Interconnection, Jurisdictional Separations and Rate Structures (Docket No. 20003), 61 F.C.C.2d 766 (1976); Western's centralized purchasing role and the release of patent and technical information, *AT&T, Investigation into the Lawfulness of Tariff F.C.C. No. 267, Offering a Dataphone Digital Service Between Five Cities* (Docket No. 20288), 50 F.C.C.2d 501 (1974); and sales to non-Bell customers, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities* (Docket No. 16979), 28 F.C.C.2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* (Docket No. 20828), 72 F.C.C.2d 358 (1979).

4. *See, e.g., Pacific Tel. & Tel. Co.*, 86 P.U.R.3d 497, 503, Addendum, 87 P.U.R.3d 487 (Cal. Pub. Utils. Comm'n 1970); *Southwestern Bell Tel. Co.*, 98 P.U.R.3d 30, 35 (Kan. Corp. Comm'n 1973); *City of Miami v. Florida Pub. Serv. Comm'n*, 208 So.2d 249, 261 (Fla. 1968); *Pacific Northwest Bell Tel. Co.*, 92 P.U.R.3d 433, 439 (Or. Pub. Util. Comm'r 1971); *Southern New England Tel. Co.*, Docket No. 11200, p. 29 (Conn. Pub. Utils. Comm'n, April 21, 1972); *Southern Bell Tel. & Tel. Co.*, 3 P.U.R.4th 406, 409 (S.C. Pub. Serv. Comm'n 1973).

concluded that the defendant stock exchanges' commission practices challenged by that plaintiff were impliedly immunized from antitrust attack, dismissed the action both against those parties and the defendant member firms, although the latter were not directly subject to the statutory provision there in issue. The same result should obtain in the instant case, because the gravamen of respondent's complaint is its challenge to the protective connecting arrangement requirement that was prescribed in the post-*Carterfone* tariffs filed by AT&T.[5]

Respondent further argues that the narrow express exemption from the antitrust laws for consolidations and acquisitions in section 221(a) of the Communications Act, 47 U.S.C. § 221(a), necessarily precludes any finding of implied immunity arising from the regulatory scheme created by the Act. Brief in Opposition at 14. This argument has been specifically rejected in numerous decisions holding that the existence of an express immunity provision in a regulatory statute does not foreclose a finding of implied immunity for conduct not covered by the express exemption. *See Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385 n. 14 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Terminal Warehouse Co.* v. *Pennsylvania R. R.*, 297 U.S. 500 (1936); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 691 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978); *International Tel. & Tel. Corp.* v. *General Tel. & Elec. Corp.*, 518 F.2d 913, 918-19 (9th Cir. 1975).[6]

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5. *Group Life & Health Insurance Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979), cited by respondent, is inapposite. In that case, this Court held that direct contractual arrangements between the defendant pharmacies and Blue Shield did not come within the exemption from the antitrust laws of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, for "the business of insurance." Its holding was based in part upon the fact that the pharmacies were entities entirely outside the insurance industry, and also upon its expressed doubts that Blue Shield itself constituted an enterprise in "the business of insurance." 440 U.S. at 213-15, 229-30. Here, by contrast, the activities of all petitioners are integrally related to the provision of regulated telecommunications services and AT&T is indisputably subject to such regulation.

6. Respondent's reliance upon *California* v. *FPC*, 369 U.S. 482 (1962), is misplaced; that decision was specifically premised on the fact

Finally, respondent argues that it is inconsistent for petitioners to assert implied antitrust immunity for the interconnection-related conduct at issue in this case after dismissal of a 1974 Government divestiture action and agreement to modification of a 1956 consent decree entered in a prior Department of Justice antitrust action. *See* "Modification of Final Judgment" in *United States v. Western Electric Co., Inc.*, Civil Action No. 17-49 (D.N.J., filed Jan. 11, 1982), *reprinted at* 5 *Trade Reg. Rep.* (CCH) ¶ 50,807. The 1949 case in which that consent decree was entered, however, did not involve petitioners' then-extant interconnection practices, much less their post-*Carterfone* tariffs and related conduct in the period after 1968. In short, the "Modification of Final Judgment" does not "conced[e] antitrust court jurisdiction" over the issues involved here, as respondent erroneously asserts (Brief in Opposition at 18).

Thus, the issue presented by the Petition cannot be mooted. To the contrary, during the pendency of the Government's divestiture action, the statute of limitations for actions by private antitrust plaintiffs was suspended by 15 U.S.C. §16(i); although a number of such suits were filed during that period and are presently pending (*see* Petition at 24), it may be anticipated that additional customers or competitors of petitioners in the provision of telephone terminal equipment will now file such suits before the statute of limitations runs. Resolution by federal courts on a piecemeal basis of the complex issue of implied antitrust immunity for petitioners' interconnection-related conduct would pose substantial judicial burdens which can be alleviated only by granting the instant Petition.

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that no pervasive regulatory scheme was involved and there was no other basis for any implied immunity. *See* Petition at 21. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), cited by respondent, is also inapposite. The *Carnation* decision turned upon the unique language of the express exemption from the antitrust laws contained in the Shipping Act (46 U.S.C. § 814) under which rate-making agreements are explicitly made lawful, and therefore exempt, only when and as long as approved by the Commission. Because the terms of the express statutory exemption were not met in that case, this Court held that an action could be brought under the antitrust laws.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: August 20, 1982

Respectfully submitted,

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No. 81-2359

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., AND BELL TELEPHONE LABORATORIES, INC., PETITIONERS

v.

PHONETELE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether American Telephone and Telegraph Company enjoys antitrust immunity for conduct which neither the Communications Act of 1934 (47 U.S.C. 151 *et seq.*) nor the Federal Communications Commission required or approved.

TABLE OF CONTENTS

Page

Statement 1

Argument 4

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Armour Packing Co. v. *United States*, 209 U.S. 56 7-8

AT&T, "Foreign Attachment" Tariff Revision, In re, 15 F.C.C.2d 605 9

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & A.R.R.*, 389 U.S. 327 12

Cantor v. *Detroit Edision Co.*, 428 U.S. 579 11

Essential Communications Systems, Inc. v. *AT&T*, 446 F. Supp. 1090, rev'd, 610 F.2d 1114 ..... 5, 6, 7

Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 ..... 6, 7

Gordon v. *New York Stock Exchange*, 442 U.S. 659 ..... 3, 10

Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205 6

Hamilton-Brown Shoe Co. v. *Wolf Bros.* 240 U.S. 251 12

Hush-a-Phone Corp. v. *United States*, 238 F.2d 266, rev'g 20 F.C.C. 391, on remand, 22 F.C.C. 112 9

Page

Cases—Continued:

Interconnect Planning Corp. v. *AT&T*, 465 F. Supp. 811 5

Jarvis, Inc. v. *AT&T*, 481 F. Supp. 120 5

Jordaphone Corp., In re v. *AT&T*, 118 F.C.C. 644 9

Keogh v. *Chicago & N.W. R.R.*, 260 U.S. 156 ..... 7, 11, 12

Litton Systems, Inc. v. *AT&T*, 487 F. Supp. 942 5

MCI Communications Corp. v. *AT&T*, 462 F. Supp. 1072 5

Mid-Texas Communications Systems, Inc. v. *AT&T*, 615 F.2d 1372, cert. denied, 449 U.S. 912 5

National Gerimedical Hospital & Gerontology Center v. *Blue Cross*, 452 U.S. 378 ..... 5, 8, 11

Northeastern Telephone Co. v. *AT&T*, 651 F.2d 76 5

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 8

Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service and Wide Area Telephone Service, First Report and Order, In re, 56 F.C.C.2d 593, on reconsideration, 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 2

Page

Cases—Continued:

Registration Decision, 56 F.C.C.2d at 598 .... 2, 10

Second Report and Order, 58 F.C.C.2d 736, on reconsideration, 61 F.C.C.2d 396, 64 F.C.C.2d 1058, aff'd, *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036, cert. denied, 434 U.S. 874 2

Sound, Inc. v. *AT&T*, 631 F.2d 1324 5

Terminal Warehouse Co. v. *Pennsylvania R.R.*, 297 U.S. 500 11

United States v. *AT&T*, No. 74-1698 (D. D.C. Aug. 11, 1982) 4, 5, 12

United States v. *AT&T*, 427 F. Supp. 57, cert. denied, 429 U.S. 1071 and 434 U.S. 966 ..... 4, 5

United States v. *AT&T*, 461 F. Supp. 1314 ..... 4, 5

United States v. *Borden Co.*, 308 U.S. 188 ..... 5, 6

United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 .... 3, 5, 10

United States v. *Terminal Railroad Association*, 224 U.S. 383 7

United States Telephone Co. v. *Central Union Telephone Co.*, 202 F. Cas. 66 (No. 2,082), cert. denied, 229 U.S. 620 7

Use of the Carterfone Device in Message Toll Telephone Service, In re, 13 F.C.C.2d 240, 14 F.C.C.2d 571 ..... 1-2, 9

Page

Cases—Continued:

Use of Recording Devices in Connection with Telephone Service, In re, 11 F.C.C. 1033 9

Western Union Telegraph Co. v. *Esteve Bros.*, 256 U.S. 566 7

Statutes:

Capper-Volstead Act, Section 2, 7 U.S.C. 292 6

Clayton Act, 15 U.S.C. (1928 ed.) 21, as amended by the Communications Act, ch. 652, 48 Stat. 1102 6

Communications Act, 47 U.S.C. 201 *et seq.* :

Section 201(a), 47 U.S.C. 201(a) 7
Sections 203-205, 47 U.S.C. 203-205 7
Section 214, 47 U.S.C. 214 7
Section 221, 47 U.S.C. 221 7

Interstate Commerce Act, ch. 309, 36 Stat. 545 7

McCarran-Ferguson Act, Section 2(b), 15 U.S.C. 1012(b) 6

Transportation Act of 1920, ch. 91, 41 Stat. 456 6

Willis-Graham Act, ch. 20, 42 Stat. 27 7

15 U.S.C. (1970 ed.) 78s(b)(9) 10

Miscellaneous:

Memorandum of FCC as Amicus Curiae, 62 F.C.C.2d 1102 (1976) 5

In the Supreme Court of the United States

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v.

PHONETELE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Phonetele is a small business that attempted to enter the market for telephone terminal equipment[1] following the Federal Communications Commission's decision in *In re*

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[1]Telephone terminal equipment means equipment attached to telephone company lines at the customer's premises: e.g., standard telephones, automatic answering and recording devices, switchboards, key telephones.

Phonetele manufactures the "Phonemaster," a device that customers can attach to a telephone to restrict outgoing calls to predetermined area codes, exchange prefixes, or lines (Pet. App. A-98).

Use of Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420, reconsideration denied, 14 F.C.C.2d 571 (1968). In *Carterfone,* the Commission held that American Telephone & Telegraph's tariff prohibiting the interconnection of safe, customer supplied equipment violated the Communications Act. Following the decision in *Carterfone,* AT&T filed an amended tariff that permitted interconnection of customer provided acoustical and inductive terminal equipment, but that continued to prohibit the interconnection of equipment that generates network control signals[2] unless that equipment was connected by means of devices called protective connecting arrangements ("PCAs"), which were provided and installed by the telephone company. The Commission, in its *Registration Decision,*[3] held that the requirement of PCAs was unnecessary and violated the Communications Act by infringing the rights of telephone company customers to use their own equipment.

Phonetele brought this action against AT&T[4] in the United States District Court for the Central District of

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[2] "Network control signals" are electronic impulses that are used to activate connections between telephone centers, to control switches, and to start and stop the equipment used for billing (Pet. App. A-30 n.19).

[3] *In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service and Wide Area Telephone Service, First Report and Order,* 56 F.C.C.2d 593 (1975), on reconsideration, 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 (1976); *Second Report and Order,* 58 F.C.C.2d 736, on reconsideration, 61 F.C.C.2d 396 (1976), 64 F.C.C. 2d 1058, aff'd, *North Carolina Utilities Commission* v. *FCC,* 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977). In this decision, the FCC prescribed technical standards and adopted a regulatory program for telephone equipment that satisfies those standards. Telephone companies are required, under the Commission's ruling, to allow interconnection of any registered equipment.

[4] It also sued Western Electric Company, AT&T's manufacturing subsidiary, and Bell Telephone Laboratories, AT&T's research arm. For convenience, we shall refer to the three petitioners as AT&T.

California, claiming that AT&T's unnecessary PCA requirement violated the federal antitrust laws. AT&T moved to dismiss the complaint on the ground that, because its allegedly anticompetitive conduct was described in a tariff on file with the FCC, it enjoyed complete antitrust immunity.

The district court dismissed the complaint (Pet. App. A-69 to A-78). The court stated that "if the federal antitrust laws are applied to the interconnection of customer owned telecommunications devices, the sophisticated regulatory program of the FCC will not work" (*id.* at A-74). It thus concluded that the antitrust laws and the Communications Act "are sufficiently mutually repugnant to compel the inference that Congress intended to repeal the antitrust laws otherwise applicable to the area of interconnection" (*ibid.*; footnote omitted).

The court of appeals reversed (Pet. App. A-1 to A-67). The court started from the premises that implied antitrust immunity is a question of congressional intent and that antitrust immunity will be inferred only where there is a " 'convincing showing of clear repugnancy between the antitrust laws and the regulatory system' " (*id.* at A-9, quoting *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (1975)).[5] It rejected AT&T's claims of blanket antitrust immunity based on "pervasive regulation" or "inconsistent" regulatory and antitrust standards (*id.* at A-11 to A-17), noting that the Commission and every other court of appeals that had considered the issue had similarly rejected AT&T's blanket

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[5]The court explained that this Court's findings of implied antitrust immunity for the securities industry and stock exchange in *Gordon* v. *New York Stock Exchange*, 442 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, *supra*, involved different statutes and different conduct (Pet. App. A-12 to A-13).

immunity claim (*id.* at A-2, A-26 n.1, A-37 n.44).[6] The court did hold, however, that if AT&T could demonstrate at trial that it reasonably and in good faith thought that the PCA requirement was necessary to protect the telephone system and was a reasonable means of doing so, it had a defense on the merits to Phonetele's antitrust suit (*id.* at A-19 to A-20, A-68). District Judge Claiborne dissented, essentially adopting the reasoning of the district court below (*id.* at A-46 to A-67).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or the decisions of any other court of appeals. Moreover, the case is in an interlocutory posture, and petitioners have presented no convincing reason why this Court should depart from its customary practice of denying review in interlocutory cases.

1. The court of appeals' holding that AT&T does not enjoy antitrust immunity merely because it is subject to federal regulation is the latest in a series of decisions rejecting AT&T's sweeping immunity claims. AT&T presented the same arguments to this Court five years ago in an unsuccessful effort to obtain dismissal of the United States' monopolization suit. This court denied AT&T's petitions for certiorari. See *AT&T* v. *United States*, 429 U.S. 1071 (1977); *AT&T* v. *United States*, 434 U.S. 966 (1977). In

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[6]The same conduct at issue here formed part of the United States' monopolization suit against AT&T. In that suit, as the court of appeals here observed (Pet. App. A-2, A-26 n.1), the district court also rejected AT&T's claim of immunity. *United States* v. *AT&T*, 461 F. Supp. 1314 (D.D.C. 1978); *United States* v. *AT&T*, 427 F. Supp. 57 (D.D.C. 1976), cert. denied, 429 U.S. 1071 and 434 U.S. 966 (1977). Judge Greene has twice subsequently found AT&T's implied immunity claims groundless — most recently in entering a consent judgment in which AT&T agreed to the divestiture of all of its local exchange monopolies. *United States* v. *AT&T*, No. 74-1698 (D. D.C. Aug. 11, 1982), slip op. 42.

addition, AT&T's contentions have been rejected by every court of appeals that has considered them. See *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76 (2d Cir. 1981); *Sound, Inc.* v. *AT&T*, 631 F.2d 1324 (8th Cir. 1980); *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372 (5th Cir.), cert. denied, 449 U.S. 912 (1980); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114 (3d Cir. 1979).[7] Moreover, the Federal Communications Commission also disagrees with AT&T's assertions of antitrust immunity.[8]

a. Whether AT&T enjoys antitrust immunity is essentially a question of congressional intent. See *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981). *United States* v. *Borden Co.*, 308 U.S. 188 (1939). As this Court recently reiterated, " '[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' " *National Gerimedical Hospital, supra*, 452 U.S. at 388, quoting from *United States* v. *National Association of Securities Dealers, Inc., supra*, 422 U.S. at 719-720. Thus, "where Congress did intend to repeal the antitrust laws, * * * this intent must be clear." *National Gerimedical Hospital, supra*, 452 U.S. at 389.

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[7]The overwhelming majority of district courts that have considered AT&T's claims have also rejected them. See *Litton Systems, Inc.* v. *AT&T*, 487 F. Supp. 942 (S.D.N.Y. 1980); *MCI Communications Corp.* v. *AT&T*, 462 F. Supp. 1072 (N.D. Ill. 1978); *Interconnect Planning Corp.* v. *AT&T*, 465 F. Supp. 811 (S.D.N.Y. 1978); *Jarvis, Inc.* v. *AT&T*, 481 F. Supp. 120 (D.D.C. 1978); *United States* v. *AT&T*, 461 F. Supp. 1314 (D.D.C. 1978); *United States* v. *AT&T*, 427 F. Supp. 57 (D.D.C. 1976), cert. denied, 429 U.S. 1071 and 434 U.S. 966 (1977). But see the decision of the district court below (Pet. App. A-69 to A-78) and *Essential Communications Systems, Inc.* v. *AT&T*, 446 F. Supp. 1090 (D. N.J. 1978), rev'd, 610 F.2d 1114 (3d Cir. 1979).

[8]See *Memorandum of FCC as Amicus Curiae*, 62 F.C.C.2d 1102 (1976) in *United States* v. *AT&T*, No. 74-1698, *supra*.

The starting point of inquiry concerning congressional intent is the text of the statute, since Congress ordinarily expresses its intent to immunize conduct by an express statutory grant of immunity.[9] Congress did expressly grant antitrust immunity to telephone companies in Section 221 of the Communications Act, 47 U.S.C. 221, but that discrete immunity provision deals only with certain telephone company mergers approved by the FCC. While strictly limiting its express grant of antitrust immunity, Congress specifically provided in the Communications Act for the application of the Clayton Antitrust Act to communications carriers, and it authorized the FCC to enforce against such carriers the Clayton Act's provisions prohibiting anticompetitive conduct.[10] This combination in the text of the Communications Act of express antitrust enforcement authority against carriers and of limited antitrust immunity militates especially strongly against AT&T's claims of implied antitrust immunity.

The legislative history confirms the sense of the text. The Third Circuit carefully reviewed this history in *Essential Communications Systems, Inc.* v. *AT&T, supra,* 610 F.2d at 1117-1121. Briefly, federal regulation of both railroads and telephone companies prior to 1920 was harmonious with application of the antitrust laws to those carriers. *Id.* at

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[9]Familiar examples are antitrust immunity for farmers' cooperatives when engaged in handling their produce, granted by Section 2 of the Capper-Volstead Act, 7 U.S.C. 292 (see *United States* v. *Borden Co., supra*), and antitrust immunity for the state regulated business of insurance, granted by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979).

[10]See Section 602(d) of the Communications Act, ch. 652, 48 Stat. 1102, amending 15 U.S.C. (1928 ed.) 21. Cf. *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456 (1945).

1117-1118.[11] And, although Congress, in the Transportation Act of 1920, ch. 91, 41 Stat. 456, substantially expanded regulation of railroads, it left communications carriers virtually untouched. 610 F.2d at 1118. Indeed, the lack of antitrust immunity for telephone companies required Congress in 1921 to enact the Willis-Graham Act, ch. 20, 42 Stat. 27, the precursor of the express immunity provision now found in Section 221 of the Communications Act. When in 1934 Congress enacted the Communications Act, it adopted the pre-1920 federal law respecting transportation common carriers,[12] with slight changes to make it applicable to communications companies. 610 F.2d at 1119-1120.[13] The result was in essence a consumer

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[11]See, e.g., *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912) (applying antitrust laws to regulated rail carriers). Since there was in this period less extensive regulation of communications companies than of railroads (see *Western Union Telegraph Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921)), the antitrust laws of course applied to telephone companies as well. *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 F. Cas. 66 (6th Cir.) (No. 2,082), cert. denied, 229 U.S. 620 (1913).

[12]Thus, the Act carried over the existing powers of the Interstate Commerce Commission to regulate telephone and telegraph companies, while adding a number of powers — e.g., the use of tariff filing and review procedures in Sections 203-205 (47 U.S.C. 203-205) — that the ICC had exercised over railroads since 1910 or earlier. The only significant grant to the FCC of a power newly conferred on the ICC by the Transportation Act of 1920 was contained in Section 214, a truncated version of the ICC's control over entry through licensing, an aspect of regulation not at issue in this case. Thus, the Communications Act, while expanding regulation of communications carriers, did not institute qualitative changes in the regulatory scheme anywhere near the magnitude of the changes that the Transportation Act made in railroad regulation. Moreover, the antitrust laws continued to apply even to railroads after 1920. *Keogh* v. *Chicago & N.W. R.R.*, 260 U.S. 156, 161-162 (1922); *Georgia* v. *Pennsylvania R.R.*, *supra*.

[13]E.g., the railroads' duty to provide "through routes" became the telephone companies' duty to "interconnect" with each other if ordered to do so by the Commission. Compare Section 201(a), 47 U.S.C. 201(a), with former Section 1 of the Interstate Commerce Act, ch. 309, 36 Stat. 545.

protection system "designed especially for the protection of telephone users * * * from discrimination in rates or service and from excess charges." *Id.* at 1120. See also *Armour Packing Co.* v. *United States,* 209 U.S. 56, 80 (1908). This system did not reflect a congressional intent to grant the agency comprehensive and exclusive authority to regulate telephone companies' relations with competitors or the structure of the industry generally.[14] And it did not preclude application of the antitrust laws, which plainly applied to common carriers prior to 1920.

In sum, the Communications Act's text and legislative history contemplate application of the antitrust laws to communications carriers. Thus, as the court of appeals correctly held (Pet. App. A-15), the only possible basis for implied immunity is an irreconcilable conflict, or plain repugnancy, between the Communications Act and Sherman Act as applied to the particular anticompetitive conduct at issue. See *National Gerimedical Hospital, supra,* 452 U.S. at 388-389. Such a conflict may be found only where the regulatory statute, or the regulatory agency, requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws. *Id.* at 389.

b. AT&T, however, does not claim that this case involves conduct that the Communications Act or the Commission required or approved. Indeed, the Communications Act protects customers from unreasonable restrictions on their use of telephone exchange service. It thus prohibits telephone companies from refusing to interconnect safe equipment purchased from competing manufacturers. Beginning in 1947, AT&T tariffs restricting customer freedom to

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[14]Contrast *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 300-301 (1963).

interconnect non-AT&T equipment were repeatedly invalidated by the Commission and the courts.[15]

In addition, when the conduct at issue in this case — the unnecessary requirement of a protective connecting attachment —was set out in a 1968 tariff, the Commission subjected that tariff to investigation because of a "number of unresolved specific questions * * *". *In re AT&T, "Foreign Attachment" Tariff Revisions,* 15 F.C.C.2d 605, 610-611 (1968). See Pet. App. A-6 to A-7, A-30 n.21. The Commission expressly warned AT&T that its decision not to grant more relief at that time should not in any way be construed as approval of the tariff. 15 F.C.C.2d at 610. The Commission subsequently held the protective connecting attachment requirement violative of the Communications Act. In so ruling, the Commission emphasized that AT&T had failed, over a seven year period, to establish any of its factual claims that protective connecting attachments were necessary to prevent harm to its equipment or injury to its

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[15]In *In re Use of Recording Devices in Connection with Telephone Service,* 11 F.C.C. 1033 (1947), the FCC rejected AT&T's effort to bar the connection of recording devices to telephone company equipment. In *In re Jordaphone Corp.* v. *AT&T,* 18 F.C.C. 644 (1954), the Commission held that AT&T's similar prohibition against connection of customer provided telephone answering devices was not required or even permitted under the Communications Act because it was discriminatory and unreasonable. The court in *Hush-a-Phone Corp.* v. *United States,* 238 F.2d 266, 269 (D.C. Cir. 1956), rev'g 20 F.C.C. 391 (1955), on remand, 22 F.C.C. 112 (1957), struck down, as a violation of the Communications Act, AT&T's broad prohibition against connecting harmless equipment made by others. And, in *In re Use of the Carterfone Device, supra,* the FCC ruled that a tariff restriction prohibiting all interconnection by any means and all "direct electrical connection" of customer provided equipment, no matter how safe, was unlawful because it prohibited the use of equipment "without regard to its effect upon the telephone system." 13 F.C.C.2d at 425; 14 F.C.C.2d at 573-574. The Commission in *Carterfone* urged AT&T to adopt technical standards that would identify those devices that might be harmful and allow the interconnection of all other equipment, which would be harmless to the telephone system. 13 F.C.C.2d at 425-426.

personnel. *Registration Decision, supra,* 56 F.C.C.2d at 598.[16]

As the foregoing discussion makes clear, the present case is radically different from *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975), where the Court held that the fixing of commission rates was impliedly immune. In so holding, the Court relied primarily on its finding that Congress had authorized such price fixing — otherwise a per se violation of the antitrust laws — when it authorized the Securities and Exchange Commission to make rules "fixing * * * reasonable rates of commission." 15 U.S.C. (1970 ed.) 78s(b)(9). See 422 U.S. at 667. This finding, combined with legislative history that showed congressional awareness of the stock exchange's long-standing practice of fixing commission rates and of the per se illegality of price fixing generally, led to the conclusion of implied immunity. The Court's similar examination of the statutory scheme and its conclusion that Congress intended to eliminate the secondary market in mutual fund shares through vertical price fixing subject to SEC control led the Court to a finding of implied antitrust immunity for such conduct in *United States* v. *National Association of Securities Dealers, Inc., supra.*[17]

c. Because there is no conflict between the antitrust laws and the regulatory scheme on the facts of the case, AT&T is forced to argue for blanket antitrust immunity on the basis

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[16]AT&T argues (Pet. 16-17) that it required PCAs in a good faith though erroneous belief that they were necessary to protect its telephone lines. Phonetele disputes this (Br. in Opp. 5-7). This disagreement awaits resolution at trial.

[17]Moreover, here, in contrast to *Gordon* and *National Association of Securities Dealers,* the regulatory agency has concluded that the regulated entity (AT&T) does not enjoy antitrust immunity with regard to the particular practice at issue. See page 5 & note 8, *supra.*

of "pervasive" Commission regulation of communications (Pet. 20-23) and "inconsistent standards" under the Communications and Sherman Acts (Pet. 14-20). AT&T's contentions, however, are inconsistent with the text and legislative history of the Communications Act. See pages 5-8, *supra*.

Moreover, this Court has rejected the argument that, even in the absence of an actual conflict, a corporation is entitled to antitrust immunity merely because it is subject to "comprehensive" or "pervasive" Commission regulation. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 595-598 (1976). Indeed, the Court has long held that, notwithstanding pervasive regulation, regulated common carriers are subject to the antitrust laws. See *Keogh* v. *Chicago & N.W. R.R.*, 260 U.S. 156, 161-162 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R.R.*, 297 U.S. 500, 515-516 (1936); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456-460 (1945). More recently, the Court emphasized that such labels as "pervasive" or "substantial" regulation are no substitute for discriminating analysis of congressional intent in the context of particular facts. *National Gerimedical Hospital, supra*, 452 U.S. at 389.

AT&T's claim that, because the antitrust laws and the Communications Act differ, they are fatally "inconsistent" (Pet. 14-20) is also groundless. Regulatory statutes such as the Communications Act always promote values other than competition; if they did not, there would be little need for them. The appropriate inquiry is not whether the regulatory standards are the same as those of the antitrust laws but whether, as applied to the conduct in question, they are in conflict. As we have shown, there is no such conflict.[18]

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[18]Should Phonetele prevail on the merits, a damage award to this competitor of AT&T would not interfere with the statutory policy of nondiscriminatory rates for customers underlying this Court's holding

2. This case is especially unworthy of review because the court of appeals' decision is interlocutory. In reversing the district court's order dismissing the action and remanding the case to the district court for further proceedings, the court of appeals has placed AT&T in the same position it would have been in if the district court had denied AT&T's motion to dismiss in the first instance. AT&T may yet prevail in the district court, or it may, as it has done in other cases of this sort, reach an amicable settlement. If AT&T becomes subject to an adverse final judgment in the district court and if the court of appeals affirms that judgment, AT&T will then be able to present its present contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of that final judgment. Until then, however, review is premature, for "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967).

This case presents no extraordinary circumstances justifying departure from this Court's settled practice of denying review in interlocutory cases. The Court on two prior occasions has denied AT&T's petitions seeking interlocutory review of this issue. See page 4, *supra*. Certainly the expense of a trial is no reason to grant interlocutory review, especially when AT&T fully tried this interconnection issue on

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in *Keogh* v. *Chicago & N.W. R.R.*, *supra*. Indeed, one of the important policies of the FCC's regulatory approach under the Communications Act in recent years has been the recognition that competition is in the public interest. This policy points strongly in favor of effective Sherman Act remedies for anticompetitive practices and tariff restrictions. See *United States* v. *AT&T*, No. 74-1698, *supra*, slip op. 63-64.

the merits last year in *United States* v. *AT&T*. Furthermore, at the present time there is no confusion about the law, for the courts of appeals uniformly have rejected AT&T's theory of implied immunity, as has the Federal Communications Commission.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 81-2359

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,
Petitioners,

—against—

PHONETELE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' RESPONSE TO THE AMICUS BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
ARGUMENT	
I. The Court Of Appeals' Holding Conflicts With The Previous Decisions Of This Court	3
A. Inconsistent Standards	3
B. Pervasive Regulation	6
II. The Conflict Between The Court Of Appeals' Holding And This Court's Prior Decisions Is Most Appropriately Resolved Now	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	PAGE
AT&T "Foreign Attachment" Tariff Revisions, 15 F.C.C. 2d 605 (1968), *reconsideration denied*, 18 F.C.C. 2d 871 (1969)	2
AT&T Proposed Tariff Revisions on Behalf of Mebane Home Telephone Co., 53 F.C.C. 2d 473 (1975)	2
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	3, 4, 5, 6
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	6, 8
Independent Broker-Dealers' Trade Association v. SEC, 442 F.2d 132 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971)	4
Interstate and Foreign MTS and WATS	
35 F.C.C. 2d 539 (1972)	2
56 F.C.C. 2d 593 (1975)	3
67 F.C.C. 2d 1255 (1978)	3
Land v. Dollar, 330 U.S. 731 (1947)	7
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	7
National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378 (1981)	5, 6
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	7
Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)	6
Southern Pacific Communications Co. v. American Tel. & Tel. Co., Civil Action No. 78-0545 (D.D.C., Dec. 21, 1982), slip op.	5
Stump v. Sparkman, 435 U.S. 349 (1978)	7
Telerent Leasing Corp., 45 F.C.C. 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976)	2
United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975)	3, 6

Statutes:

PAGE

Clayton Act, 15 U.S.C. §12 *et seq.* (1976)
§21(a) 6
§21(e) 6

Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (1976) 7

Communications Act of 1934, 47 U.S.C. §151 *et seq.* (1976)
§221(a) 6

Federal Power Act, 16 U.S.C. §791a *et seq.* (1976) 7

Congressional Materials:

Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., *Securities Industry Study* (Committee Print 1972) 4

S. Rep. No. 781, 73d Cong., 2d Sess. (1934) 5

Miscellaneous:

Brief of the United States as *Amicus Curiae* in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) 3, 4, 6

Brief of the United States as *Amicus Curiae* in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973) 7

R. Stern & E. Gressman, *Supreme Court Practice*, §4.19 (5th ed. 1978) 7

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- against -

PHONETELE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' RESPONSE TO THE AMICUS BRIEF OF THE UNITED STATES

The United States contends in its brief *amicus curiae* ("DOJ Br.") that the decision of the court below is correct because implied antitrust immunity "may be found only where the regulatory statute, or the regulatory agency, requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws." DOJ Br. 8. The test advocated by the Justice Department directly conflicts with the controlling decisions of this Court, which have found implied immunity for conduct that has neither been compelled nor approved by statute or by regulatory agencies. *See* Petition 17-18, 21. Indeed, those cases rejected the very test that the Department advances here.

Furthermore, the Department's brief is largely devoted to addressing a question that is not presented by the petition. Petitioners are not claiming "blanket antitrust immunity" for their conduct "merely because [they are] subject to federal regulation." DOJ Br. 3-5, 10. Rather, petitioners' sole contention is

that the specific interconnection conduct at issue here is impliedly immune from antitrust attack because it is subject to pervasive public utility regulation under a public interest standard that is inconsistent with the competition standard of the antitrust laws.

The Department also misstates the relevant regulatory history. *Compare* DOJ Br. 8-10 *with* Petition 5-13. For example, the Government asserts that the FCC found that the post-*Carterfone* tariffs at issue in this case violated the Communications Act during the period that they were in effect and that there was no need for connecting arrangements to protect the network from harm. DOJ Br. 8-10. However, the very decision which the Government asserts "warned" petitioners that their post-*Carterfone* tariffs had not received FCC approval expressly held that the tariffs "[are] not in conflict with our *Carterfone* ruling." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871, 872 (1969). And during the subsequent six year period in which the FCC considered whether it could safely allow the interconnection of customer-owned terminal equipment under any other circumstances, it repeatedly stated that petitioners' tariffs fully complied with its prior rulings.[1] In 1975, when the FCC established a registration program to protect the network and held that equipment satisfying the requirements of the program could be connected directly to the network, it therefore held only that the tariffs' requirement was "unnecessarily restrictive" prospectively,

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1. *See Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 540-42 (1972) (holding that "[t]he present restrictions in the interstate . . . tariffs . . . do not violate our decision in *Carterfone*" and that the Commission was then "concerned with the pending and unresolved basic issues . . . whether, and to what extent, there is public need for us to go beyond what we ordered in *Carterfone*"); *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 214, 221 (1974) (noting petitioners' tariffs were "filed in compliance with our *Carterfone* ruling" and upholding the "continuing efficacy . . . of *Carterfone* and the effective tariffs on file with this Commission in implementation of *Carterfone*"), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *AT&T Proposed Tariff Revisions on Behalf of Mebane Home Telephone Co.*, 53 F.C.C.2d 473, 476 (1975) (noting that the post-*Carterfone* tariffs went beyond the actual requirements of that decision in liberalizing interconnection).

and the FCC retained the requirement of a protective connecting arrangement for unregistered equipment, explicitly acknowledging a sufficient "likelihood of harm." *Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593, 598 (1975), 67 F.C.C.2d 1255, 1272 n. 21 (1978). The FCC made no finding that the post-*Carterfone* tariffs had been unlawful or unreasonable at any earlier time.

ARGUMENT

I.

The Court Of Appeals' Holding Conflicts With The Previous Decisions Of This Court

The entire basis for the Department's assertion that the decision below is correct is its claim that no conduct can be held to be immune from the antitrust laws unless "the regulatory statute, or the regulatory agency, requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws." DOJ Br. 8. This claim is flatly inconsistent with the decisions of this Court.

A. Inconsistent Standards

First, where, as here, the specific conduct otherwise would be subject to fundamentally inconsistent legal standards, this Court has held that the conduct is impliedly immune from the antitrust laws, even when there has been neither regulatory compulsion nor regulatory approval. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975); Petition 14-20. *Gordon*, for example, is dispositive on this point. In *Gordon*, the SEC could have approved or required the fixed commission rules voluntarily adopted by the defendant securities exchanges, but it stated that it had "not approved" them and finally promulgated a rule prohibiting that practice. 422 U.S. at 675, 677.[2] Indeed,

2. *See* Brief of United States as *Amicus Curiae* at 39-41 in *Gordon v. New York Stock Exchange, supra*. Indeed, in its *amicus curiae* brief

the Justice Department in *Gordon* argued, as it has here, that there can be no immunity in the absence of regulatory compulsion or necessity, but this Court expressly rejected that argument (422 U.S. at 688):

> "We believe that the United States, as *amicus*, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity."

The Justice Department nonetheless attempts to distinguish *Gordon*. First, it argues (DOJ Br. 10) that the regulatory statute in *Gordon* was "radically different" because it referred to establishment of commission rates by the SEC, whereas the broad language of the Communications Act grants the FCC far more expansive and comprehensive powers that embrace, but are not confined to, regulating the interconnection of terminal equipment. The Department's formalistic distinction would produce interference with regulation in precisely the situations in which it is most counterproductive and unfair. This would be particularly

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there, the Department emphasized that the SEC had disclaimed it had taken any reviewable agency action between 1934 and 1975 with respect to the exchanges' rates, "much less given formal 'approval' of the rules." *Id.* at 39-40. *See also Independent Broker-Dealers' Trade Association v. SEC*, 442 F.2d 132, 137 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., *Securities Industry Study* at 58 (Committee Print 1972) (SEC's scrutiny of the exchanges' rules "was 'at most in the nature of an interlocutory non-objection'".)

ironic because the public regulation of terminal equipment has been far more active and comprehensive than SEC regulation of commission rates and has been characterized by the imposition, by regulatory authorities, of conditions on the interconnection of terminal equipment that are inconsistent with the antitrust laws' exclusive standard of promoting competition. *Compare* page 4, n. 2, *supra*, *with* Petition 5-13.

The Justice Department's effort (DOJ Br. 10) to distinguish *Gordon* on the ground that there is nothing in the legislative history showing Congressional "awareness" that there could be restrictions on the interconnection of customer-provided terminal equipment is similarly meritless. When the Communications Act was passed in 1934, there were no entities that competed with telephone common carriers in the provision of terminal equipment due to the preexisting interconnection restrictions,[3] and Congress contemplated that telephone equipment and service would be provided solely by common carriers. *See* S. Rep. No. 781, 73d Cong., 2d Sess. at 2 (1934) (referring to "regulation of the telephone monopoly").

Finally, the Justice Department's argument (DOJ Br. 8) that *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981), adopted the Department's current position is erroneous. This Court's holding that there was no immunity in that case was based not on the absence of regulatory compulsion or approval of the challenged conduct, but rather on the ground that the case involved "a regulatory structure quite different from those considered previously," in which "[t]here

3. Prior to the enactment of the Communications Act, numerous state statutes and decades of state regulatory decisions imposed end-to-end service responsibility on the common carriers, and those states had adopted tariffs generally prohibiting the connection of customer-provided equipment to the network. *See* Petition 6-7 and nn. 8-9. As Judge Richey recently held, those tariffs "were not merely sanctioned" by the state commissions but "were required by those agencies as being necessary for the companies to fulfill their common carrier obligations." *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, Civil Action No. 78-0545 (D.D.C., Dec. 21, 1982), slip op. at 23 (emphasis omitted).

simply was no regulation . . . as [the state] had not established any state regulatory agency with authority to review" the challenged conduct. *Id.* at 389-90.

B. Pervasive Regulation

Second, where, as here, challenged conduct is at the heart of a pervasive scheme of public utility regulation, this Court has consistently held that the conduct is immune from antitrust liability, even in the absence of regulatory authorization or approval. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); Petition 20-23.[4] The Department virtually ignores these authorities, except to criticize this Court's "pervasive regulation" standard. DOJ Br. 11. Its failure to address this line of cases is not surprising. When it previously unsuccessfully opposed antitrust immunity in *Gordon*, *NASD*, and similar cases, the Justice Department conceded that there should be immunity when, as here, conduct is central to "public utility regulation."[5]

4. These decisions also dispose of the Department's claims (DOJ Br. 6,9) that the combination in the Communications Act of express antitrust enforcement authority and limited express immunity for consolidations of telephone common carriers (47 U.S.C. § 221(a)) "militates especially strongly against [petitioners'] claims of implied antitrust immunity." This Court has pointedly rejected just such an argument. *Hughes Tool Co. v. Trans World Airlines, Inc., supra*, 409 U.S. at 385 n. 14. *See also* Petitioners' Reply Brief 6 and n. 5 (analyzing additional cases).

Nor does section 11(e) of the Clayton Act, 15 U.S.C. § 21(e), bar immunity in this case. Section 11(a) of the Clayton Act empowers the FCC (as well as the ICC, CAB, FRB and FTC) to enforce provisions of the Clayton Act pertaining to price discrimination, rebates, mergers, and interlocking directorships, none of which conduct is at issue in this case. Section 11(e) pertains only to orders issued in the enforcement proceedings authorized by section 11(a). *See Hughes Tool Co. v. Trans World Airlines, Inc., supra* (finding conduct subject to CAB regulation impliedly immune); *Pan American World Airways, Inc. v. United States, supra* (same).

5. *See, e.g.*, Brief for United States as *Amicus Curiae* at 16, 35 in *Gordon v. New York Stock Exchange, Inc., supra* (asserting exchanges are not entitled to immunity because they are not subject to "comprehensive, public utility-like . . . regulation"). Indeed, in its brief as

Similarly, in those decisions in which this Court has declined to find implied immunity, it has rested its holdings on the ground that there was no pervasive public utility-type regulation. For example, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court premised its finding of no antitrust immunity on the ground that the Federal Power Act is not "a pervasive regulatory scheme for controlling the interstate distribution of power" and that Congress expressly declined to impose common carrier obligations on power companies. *Id.* at 373-74; *see also id.* at 384-87 (Stewart, J., dissenting). When conduct attacked under the Sherman Act is at the heart of a pervasive scheme of common carrier regulation, as it is here, *Otter Tail* establishes that the conduct is impliedly immune from antitrust liability.

II.

The Conflict Between The Court Of Appeals' Holding And This Court's Prior Decisions Is Most Appropriately Resolved Now

Finally, the Department contends that this case is "especially unworthy of review" because it is in an "interlocutory posture" and allegedly "premature". DOJ Br. 4, 12. The decision below, to be sure, reversed an order dismissing the case on grounds of immunity. However, this Court has frequently reviewed decisions in precisely this procedural posture, *see, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978), because the applicability of a dispositive defense is "fundamental to the further conduct of the case." R. Stern & E. Gressman, *Supreme Court Practice*, § 4.19 at 301 (5th ed. 1978). *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n. 2 (1947).

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amicus curiae in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), the Department not only distinguished the self-regulation found in the commodities trading industry under the Commodity Exchange Act from industries regulated under "pervasive regulatory schemes," but it expressly referred to the regulation of telecommunications common carriers under Title II of the Communications Act as an example of a pervasive regulatory scheme in which immunity exists. *See* Brief for United States as *Amicus Curiae* at 23 n. 11.

Review at this time is particularly appropriate here because the resolution of the conflict between the Court of Appeals' decision and the decisions of this Court would conserve judicial resources and avoid needless expense and effort not only in this case but also in the numerous similar cases now pending. Contrary to the Department's claims (DOJ Br. 12-13), the interest in terminating litigation "without having the parties invest untold efforts and vast expense in a . . . wholly irrelevant contest" is an especially important one where jurisdictional issues are raised in lengthy and complex antitrust litigation, *Hughes Tool Co. v. Trans World Airlines, Inc.*, *supra*, 409 U.S. at 390 (Burger, C.J., dissenting), and it would obviously promote the ends of orderly procedure and the overall public interest to do so here.

CONCLUSION

For the reasons stated above and in petitioners' earlier submissions, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Apeals for the Ninth Circuit.

Dated: January 6, 1983

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